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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

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FEDERAL COMMUNICATIONS COMMISSION

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Washington, D.C. 20554

In the Matter of

The Applicability of 47 C.F.R. §73.658(g) to Univisa, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1995; Released: April 3, 1995

By the Commission: Commissioner Barrett issuing a concurring statement

I. INTRODUCTION

1. Before the Commission for consideration is a "Petition for Declaratory Ruling or, in the Alternative, Temporary Waiver" ("Petition" or "Univisa/Costa Petition") filed by Univisa, Inc. (Univisa), and Costa de Oro Television Inc. (Costa) seeking either confirmation that the dual network rule, 47 C.F.R. §73.658(g), does not apply to Univisa's provision of programming to Costa, licensee of KSTV-TV, Ventura, CA, or, in the alternative, for a waiver of this rule. After soliciting public comment on the petition,[1] the Commission received three pleadings: one comment, one reply comment, and one further comment.[2]

2. The dual network rule prohibits television stations from affiliating with a network organization that maintains more than one network of television stations unless the networks are not operated simultaneously or unless there is no substantial overlap in the territory served by the networks. For the purposes of this rule, a "network" is any national or regional network engaged in the "simultaneous broadcasting of an identical program by two or more connected stations."[3]

II. DISCUSSION

3. *The Petition.* The Petition explains that Univisa is a U.S. subsidiary of Grupo Televisa, S.A. de C.V. (Televisa) and currently owns Galavision, a Spanish language program service. While Galavision programming is chiefly distributed to cable television systems, it is also delivered to two UHF full-power and several low-power television stations.[4] Univisa also holds a minority interest in Univision Network Limited Partnership,[5] which owns and manages the Univision Network ("Univision"), a Spanish-language television service distributed to nineteen full-power and eighteen low-power television stations.[6] Univision operates Galavision under a management contract using programming licensed to Galavision by Univisa.

4. Petitioners explain that they do not believe the dual network rule prohibits Univisa from operating a broadcast network (*i.e.*, Galavision) in markets where Univision also has operating affiliates. They argue that because Univisa's minority interests in Univision's parent company, the Univision Network Limited Partnership, are non-controlling, Univisa does not "maintain" a second network. In addition, they contend, there is no substantial territorial overlap of the stations comprising the Galavision and Univision networks. According to the petitioners, Univision currently serves thirty-seven different communities in television markets throughout the United States. Three of these thirty-seven markets -- Los Angeles, Houston and Santa Barbara -- contain the communities of license of Galavision full-power and low-power affiliates.[7] Petitioners contend, however, that although the Los Angeles market contains both KMEX-TV's community of license (Los Angeles, CA) and KSTV-TV's community of license (Ventura, CA), the two networks' affiliates do not, infact, serve the same communities within that market because Univision's station, KMEX-TV, cannot be received over the air in a large portion of the adjoining Ventura County.[8] Therefore, petitioners conclude, at most, only two of the thirty-seven communities served by Univision currently receive service from Galavision affiliates.[9] This, they argue, means that the territorial overlap of the two networks is insubstantial and that, given the size of the subject markets and the amount of competition present in them, any impact on economic competition and diversity would be insignificant.

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[1] *See Public Notice*, "Petition for Declaratory Ruling or Waiver of the Dual Network Rule - Section 73.658(g) of the Commission's Rules," (released March 8, 1994).

[2] *See* Comments of Paso Del Norte Broadcasting Corporation ("Paso Del Norte"), licensee of KINT-TV, El Paso, Texas; Reply Comments of Univisa; Further Comments of Paso Del Norte.

[3] 47 U.S.C. §153(p) (definition of "chain broadcasting"); *see also Home Shopping Inc.*, 4 FCC Rcd 2422 (1989).

[4] In its original filing, Univisa identified these stations as Costa's full-power station KSTV-TV, Ventura, CA, KTFH-TV, Conroe, TX, also full-power, and low-power stations K38DK, Santa Barbara, CA, and K25DX, Santa Maria, CA. In reply comments, Univisa revealed that, because of contractual commitments, it may also need to supply Galavision network service to low-power television stations K22DD, San Jose, CA, K22BH, Corpus Christi, TX, and K17BY, San Antonio, TX.

[5] Univisa and Venevision International, Ltd., each hold a 25 percent interest in the Univision Network Limited Partnership, the owner and manager of the Univision Network. In addition, a Univisa official, Jaime Davila, is the president of the partnership.

[6] Five of these stations (two full-power and three low-power) are licensed to communities located in markets served by Galavision broadcast affiliates. These communities are: Ventura, CA (which is served by petitioner Costa's Galavision affiliate KSTV-TV); Conroe (Houston), TX; Santa Barbara, CA; Corpus Christi, TX, and San Antonio, TX.

[7] As indicated in footnote 4, *supra*, in subsequent filings it became apparent that Univisa may also be under contractual obligation to provide Galavision to low-power stations in three other markets, at least two of which -- Corpus Christi and San Antonio, TX -- are also served by Univision affiliates.

[8] Indeed, petitioners assert, the predicted Grade B contours of Costa's Galavision affiliate, KSTV-TV, and Univision's KMEX-TV only slightly intersect.

[9] Neither petitioners nor the one commenter (Paso Del Norte) directly address the fact that it appears the two networks' operations overlap in Santa Barbara, CA, as well. Santa Barbara is the community of license of low-power television station K38DK, which petitioners describe as an "associated" station of KSTV-TV, a Galavision affiliate, and low-power television station KO7TA, a Univision affiliate.

5. *Comments.* In response to the *Public Notice*, a single comment was filed. In it, Paso Del Norte, the licensee of Univision affiliate KINT-TV, El Paso, Texas, contends that the connections between Univisa, Galavision, and Univision clearly trigger the dual network rule. Therefore, it states, the Petition must be treated as a waiver request. If that waiver was "narrowly tailored to solve a temporary programming problem for KSTV-TV and KTFH-TV," it continues, it would have no objection.[10] A broader waiver, it fears, could cause KINT-TV to encounter increased competition should Galavision view Commission approval as a "green light" to obtain Galavision affiliates in communities such as El Paso, TX, where currently it has no affiliate, and would diminish KINT-TV's bargaining power with Univision. Accordingly, Paso Del Norte would find a broad waiver anti-competitive and objectionable. It urges the Commission to "make it emphatically clear that it is not creating a precedent for future waivers."[11]

6. In Reply Comments, Univisa indicates that in order to meet contractual commitments, it may need to provide Galavision network service to three low-power stations in addition to the stations listed in its initial filing.[12] At least two of these appear to be located in communities also served by Univision. Galavision's contractual obligations to these additional stations do not expire until 2000 or 2001. Univisa states that Paso Del Norte has been made aware that the waiver Univisa seeks would pertain to a strictly limited number of stations and would last only until the expiration dates of its programming agreements with these stations. Subsequently, Paso Del Norte filed Further Comments in which it expresses approval of Univisa's request. Paso Del Norte states that, because the provision of Galavision programming would be to a limited number of stations for a limited period of time and is being sought solely in the interest of contractual compliance, it has no objection to the grant of the relief sought.

7. *Analysis.* For the purposes of this discussion we will assume, *arguendo*, that, given the extent and nature of their interrelationships, Galavision and Univision are commonly maintained networks. Accordingly, we will approach this as a waiver request. (Because we have decided to grant the requested waiver, we believe it is unnecessary to reach the issue of whether or not Galavision and Univision are commonly maintained networks under our rules.) For the following reasons, we grant that waiver.

8. It is axiomatic that waiver requests must be given a "hard look." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). To justify a waiver, a petitioner must introduce evidence showing that the rule's purpose is not undermined by waiving the rule in its particular circumstances (*id.*), and "that circumstances 'peculiar' to its own situation distinguish it from 'the general run of situations to which the rule applies' and make application of the rule to it 'less appropriate.'" *Home Shopping Inc.*, 4 FCC Rcd 2422 (1989)(citation omitted).[13] When "... the rule's purpose is not served by applying it to its particular circumstances, the agency has no legal alternative but to waive the rule in most cases." *ARTEC*, 70 FCC 2d 2291, 2298 (1979).

9. The dual network rule was adopted in 1941 as a consequence of the Commission's concern over the operation of two separate national networks -- the "Red" and the "Blue" networks -- by the same organization -- NBC. Due to the amount of programming they provided and their commercial practices, these networks were believed to have the capability to monopolize non-local program services in many communities. *See Federal Communications Commission*, "Report on Chain Broadcasting," 70-73 (1941); *see also Network Broadcasting by Standard AM & FM Stations*, 63 FCC 2d 674, 684 (1977). The rule was "intended to promote program diversity by ensuring that a single organization does not dominate the broadcast services in an area by operation of two networks. It also has the goal of ensuring economic competition in the advertising market." *Home Shopping, Inc.*, 4 FCC Rcd at 2423; *see also Network Broadcasting by Standard AM & FM Stations, supra* at 684.

10. In previously granting waivers of the dual network rule we have looked at a number of factors, not all of which necessarily have to be present. These have included:

(1) whether the consequences of applying the rule are inconsistent with the underlying purposes of the rule[14] or, put another way, granting an exemption will not thwart the purposes of the rule and will, instead, serve the public interest;[15]

(2) whether the amount of simultaneously broadcast programming is minimal (so the purpose of the rule will not be thwarted by a waiver);[16]

(3) whether simultaneous operation is during a limited number of hours and those hours are outside those when the overwhelming percentage of television viewing occurs;[17]

(4) whether the proposal "merits encouragement as a

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[10] KTFH-TV, Conroe (Houston), TX, is a Galavision affiliate licensed to San Jacinto Television Corporation. In a letter dated June 9, 1993, a copy of which is attached to the Univisa/Costa De Oro petition, Univisa asked the Commission to confirm its belief that the dual-network rule does not apply to that station.

[11] Comments of Paso Del Norte, at p. 5.

[12] *See* footnote 4, *supra*.

[13] In *Home Shopping Inc.*, the Commission, in part, granted Home Shopping Network Inc. ("HSN") a waiver of the dual network rule. HSN provided a 24 hour per day network service, consisting of home shopping programming, to a number of operating UHF stations. It also sought to provide an overnight programming service, HSN Overnight, to a number of UHF stations. HSN Overnight and the 24 hour HSN service provided similar but not duplicative programming to affiliates. The Commission found that, although the dual network rule applied, the particular circumstances of the case made application of the rule inappropriate. Specifically, it found that the circumstances were materially different from the dual network operations of NBC that prompted adoption of the rule and did not raise the type of concerns that the rule was intended to address, namely, preserving program diversity and economic competition in the advertising market. It noted that the amount of simultaneous operation was limited to 3.7 hours per day in a limited number of markets and that simultaneous operation would be consistent with the Commission's goals of encouraging alternatives to traditional networking.

[14] *American Broadcasting Companies, Inc.*, 11 FCC 2d 163 (1967).

[15] *Home Shopping Inc., supra* at 2423.

[16] *American Broadcasting Companies, Inc., supra* at 165.

[17] *Home Shopping Inc., supra* at 2423.

new and imaginative approach to networking,"[18] or the programming fare is unique, and the method of generating revenues and the operational approach are innovative;[19]

(5) whether the networks are materially different from the dual network operation of NBC that prompted adoption of the dual network rule;[20]

(6) whether simultaneous operation implicates any concerns about competition in the advertising market;[21]

(7) whether simultaneous operation will be consistent with the Commission's goals of encouraging alternatives to traditional networking[22] and whether waiver will encourage possible innovation and experimentation in the operation of networks;[23] and,

(8) whether grant of the waiver may assist minorities and small businesses.[24]

11. As an initial matter, the networks at issue in the instant case are materially different from those that the Commission addressed in 1941, when it adopted the dual network rule. At that time, NBC (and its parent company RCA) dominated the national programming and advertising markets. By way of example, RCA (a) controlled two of the four national radio networks (the "Red" and the "Blue" networks); (b) had as affiliates of its Red and Blue networks, by February 1, 1941, 221 stations, representing 26.4 percent of the total number of licensed broadcast stations;[25] (c) owned broadcast stations; (d) held patents for radio and other equipment; (e) was the sole sales agent for radio receivers sold by General Electric and Westinghouse; (f) manufactured receivers, transmitters, tubes, phonographs and records, sound equipment for motion picture theaters and a variety of the other products; (g) was in the motion picture business holding as much as 64% of the outstanding stock of RKO (down to between 12 and 15 percent by 1939); (h) had contracts with Victor Talking Machine Co. and Brunswick-Balke-Collender Co. providing that recording artists of both recording companies were to broadcast over the facilities of RCA stations; (i) was also an agent for artists and concert services through its ownership of "Civic Concert Service, Inc." which organized and managed concert courses service in, by 1938, 77 cities (leading independent artist representatives to complain that NBC was exercising unfair control over the supply of talent by having control of employment opportunities and direct access to the radio audience); and (j) owned a transcription service that transcribed musical selections and programs and made them available for lease or license to individual stations, and a wire line recording service for recording programs while they were being broadcast.[26] These stations utilized nearly half of thextotal nighttime power of United States broadcast stations.[27] Moreover, NBC (and, for that matter, CBS) affiliates were required to take network commercial programs unless they were not in the public interest. NBC required an affiliate not clearing network programming to "be able to support his contention that what he had done was more in the public interest than had he carried on the network program."[28] NBC had a competitive advantage over the other two national networks in competition for advertising, as well, by giving advertisers discounts based on the amount of business they did with NBC.[29] Finally, NBC could shift its affiliates from one network to the other regardless of the station's wishes -- and the Red network was the more profitable by a wide margin.[30] Indeed, RCA-NBC possessed such power in network broadcasting that, in adopting the dual network rule, the Commission stated:

> We are impelled to conclude that it is not in the public interest for a station licensee to enter into a contract with a network organization which maintains more than one network. With two out of the four major networks managed by one organization, a station which affiliates with that organization thereby contributes to the continuance of the present noncompetitive situation in the network-station market. The reestablishment of fair competition in this market is contingent upon ending the abuses inherent in dual network operation; our regulation is a necessary and proper means of re-establishing that fair competition.
>
> Our determination that it is not in the public interest for a station to enter into a regular affiliation contract with a network organization maintaining more than one network does not, however, rest merely upon competitive considerations. We are seriously concerned also with the maintenance of a free radio system from the point of view of concentration of power over licensees and their listeners.[31]

12. Nothing remotely approaching the market power, control and influence possessed by RCA-NBC in 1941 is held by Galavision and Univision. With regard to the programming market, the Commission has noted in a previous matter involving many of these same parties, there are more than 30 sources, of varying sizes, providing Spanish-language television programming to the U.S. market. *Univision Holdings, Inc.*, 7 FCC Rcd 6672, 6680 (1992). Moreover, just counting the broadcast media alone, there are currently four major national television networks, four

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18 *American Broadcasting Companies, Inc., supra* at 168.
19 *Home Shopping Inc., supra* at 2423.
20 *Id.*
21 *Id.*
22 *Id.*
23 *American Broadcasting Companies, Inc., supra* at 164-65.
24 *Home Shopping Inc., supra* at 2424.
25 *Report on Chain Broadcasting, supra*, pp. 5-20.
26 "In its transcription business, NBC cooperates with RCA Manufacturing Co., its affiliate, also owned by RCA. NBC arranges the programming and sells the transcriptions, while RCA Manufacturing makes the recordings." Additionally, "[p]rior to April 1, 1941, NBC refused to permit any transcription company other than its associate, RCA Manufacturing Co., to make a "simultaneous wire line recording" of an NBC network commercial program." NBC-RCA controlled approximately 26 percent of the total transcription business carried on in the United States in 1938. *Report on Chain Broadcasting*, Docket No. 5060, p.18 (May 6, 1941). For a fascinating and detailed look at the situation in radio network broadcasting that led to the adoption of the chain broadcasting rules, see generally *Report on Chain Broadcasting, supra*.
27 *Id.* at 19.
28 *Id.* at 66.
29 *Id.* at 71.
30 *Id.* at 70.
31 *Id.* at 72.

television program networks, nineteen regional television networks and a public broadcasting system,[32] a far cry from the type of national programming dominance represented in 1941 by the NBC Red and Blue Networks.

13. Moreover, Galavision and Univision do not present any concerns with respect to the national advertising market. Of the $30.6 billion spent on television and cable television advertising in 1993, $324 million, or slightly more than 1 percent, was spent on Spanish language television advertising.[33] Admittedly, Univision is the stronger, in terms of viewing share, of the two national television networks specializing in Spanish language programming (*i.e.*, Univision and Telemundo). In 1993, Univision's Nielsen share of Spanish language television viewership was 66% compared to 34% for Telemundo."[34] Given the small share of total television advertising involved in the Spanish language market, however, Univision's relative strength in that particular market segment does not implicate the concerns underlying our rules.

14. In addition, an analysis of the composition of the specific markets involved supports the conclusion that waiver of the rule will neither compromise the competitiveness of the local advertising markets, nor impair the underlying diversity goals of the rule. Specifically, each of the markets in which there is some degree of overlap between affiliates of the two networks is rich in alternative media sources. The Los Angeles (Barstow, Corona & San Bernardino-Ontario, CA) market, the second largest in the nation, is served by 26 full-power television stations.[35] Included among these are not only the affiliates of Galavision and Univision but, additionally, two other Spanish-language stations, including an affiliate of Telemundo, another Spanish-language programming network.[36] The Houston market, which includes Conroe, TX, is served by some 16 full-power television stations including a Telemundo affiliate and a non-commercial educational television station that broadcasts part of the time in Spanish.[37] The San Antonio-Victoria (Kerrville), Texas, market hosts 11 full-power and 10 low-power television stations.[38] The Santa Barbara-Santa Maria-San Luis Obispo (Oxnard), California, market is served by five full-power and five low-power television stations.[39] Even Corpus Christi, Texas, the nation's 123rd largest television market, is served by five full-power and six low-power television stations.[40]

15. Finally, although factors such as a limited amount of geographic overlap and a limited duration of the waiver have not previously been criteria for dual network rule waivers, we believe these factors to be sufficiently analogous to criteria (2) and (3), above, to weigh in favor of grant of the subject waiver. There are, at most, only five markets in which there will be any overlap. Moreover, the waiver would last only a limited period of time. Two of the network agreements will expire in 1995 and the last Galavision network agreement with any of the subject stations will expire April 30, 2001.

16. For the foregoing reasons, we conclude that grant of the requested waiver will not in any way compromise the rule's objectives. There is no threat that Galavision and Univision will dominate the broadcast services in any market in which there is overlap, or that a waiver will adversely affect our diversity goals or endanger economic competition in any of the affected advertising markets. We have previously granted waivers of the instant rule where, as here, the consequences of waiver would not undermine any interest served by the rule. *See Home Shopping Inc. supra* at 2423. Because we find that, on balance, a sufficient number of factors that we have previously found to warrant waiver are present, we will grant the waiver of Section 73.658(g) of our Rules.

17. In view of the foregoing, we find that, to the extent that Section 73.658(g) of our Rules is applicable to Univisa's provision of Galavision network service to television stations KSTV-TV, Ventura, CA, and KTFH-TV, Conroe, TX, and low-power television stations K38DK, Santa Barbara, CA, K25DX, Santa Maria, CA, K22DD, San Jose, CA, K22BH, Corpus Christi, TX and K17BY, San Antonio, TX, that Section should be waived for the duration of these stations' current affiliation agreements with Galavision. A waiver for the low-power stations is necessary because, although such stations are governed by Part 74 of the Commission's Rules, Section 74.780 of our rules provides, in part, that Section 73.658 is applicable to TV translators, low-power TV and TV booster stations.

18. Accordingly, IT IS ORDERED that Univisa, Inc.'s and Costa De Oro Television Inc.'s Petition for a waiver of Section 73.658(g) of the Commission's Rules is GRANTED with respect to the stations identified above for the duration of these stations' current affiliation agreements with Galavision, and otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[32] *Broadcasting & Cable Yearbook - 1994*, Vol. 1, pp. G62-70.
[33] *Hispanic Business*, "Ad Spending Tops $720 Million," December 1993 at p. 40.
[34] *Broadcasting and Cable*, "Hispanic Broadcasting and Cable," November 15, 1993, at 40.
[35] *Broadcasting & Cable Yearbook 1994, Vol. 1*, p. C-164 (1994).
[36] *Id.* at C-9 and C-110.
[37] *Id.* at C-69 and C-154.
[38] *Id.*, at C-107 and C-185.
[39] *Id.*, at C-98 and C-186.
[40] *Id.* at C-107 and C-140.

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: IN THE MATTER OF THE APPLICABILITY OF 47 C.F.R. SECTION 73.658(g) TO UNIVISA, INC.

In this Memorandum Opinion and Order, the Commission grants a temporary waiver of the dual network rule to Univisa to enable it to continue to provide "Galavision" Spanish language network service to its limited number of full-service and low-power broadcast television affiliates. Univisa owns Galavision, and holds a minority interest in the Univision Network Limited Partnership, which owns and manages the Univision Network which provides Spanish-language programming to full and low power television stations in markets served by Univisa. Univision operates Galavision under a management contract using programming licensed to Galavision by Univisa.

The duel network rule, 47 C.F.R. Section 73.658(g), prohibits television stations from affiliating with a network organization that maintains more than one network of television stations unless the networks are not operated simultaneously or unless there is no substantial overlap in the territory served by the networks.

In the past, I have expressed concern about the modification of the Commission's rules by way of the waiver process.[1] While I concur in the decision, I remain concerned about the Commission's use of the waiver process in lieu of rulemaking.

[1] *See, e.g.,* Pegasus Broadcasting, 7 FCC Rcd 8625 (1992) (Dissenting Statement of Commissioner Andrew C. Barrett); Sunshine Television, Inc. 8 FCC Rcd 4428, 4432 (1993) (Statement of Commissioner Andrew C. Barrett, Concurring in Part).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Jones Eastern
of the Outer Banks, Inc.
Licensee of Station WRSF(FM)
Columbia, North Carolina

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: March 10, 1995; Released: April 3, 1995

By the Commission: Commissioner Quello dissenting and issuing a statement.

1. The Commission has under consideration (1) a $20,000 Notice of Apparent Liability (NAL) issued November 9, 1992, 7 FCC Rcd 7309 (1992), to Jones Eastern of the Outer Banks, Inc. (Jones Eastern), licensee of Radio Station WRSF(FM), Columbia, North Carolina, and (2) the response, received on December 7, 1992, of C.J. Jones, President of Jones Eastern.

2. The forfeiture was assessed for Jones Eastern's apparent willful and repeated violations of Section 73.1125 of the Commission's Rules by failing to maintain a "meaningful management and staff presence" at the station's main studio. The facts are set forth in full detail in the NAL and will not be repeated here.

3. In response to the NAL, Jones Eastern first asserts that the Commission erroneously concluded that Jones Eastern has failed to make any changes in its main studio staffing arrangement, including implementation of its new staffing proposal set forth in its July 1991 Petition for Reconsideration and Clarification. According to Jones Eastern, this proposal was implemented in June 1991 even before the Petition for Reconsideration and Clarification was submitted. In October 1992, the Commission approved Jones Eastern's new staffing proposal, but later issued the NAL in November 1992, under the assumption, Jones Eastern claims, that Jones Eastern had not yet implemented the proposal. Jones Eastern maintains that its counsel who drafted the Petition for Reconsideration and Clarification failed to understand and convey that the proposal had already been implemented in June 1991, and erroneously gave the impression that the staffing proposal was merely a proposal rather than an accomplished fact. However, this assertion does not change the fact that from at least October 1989, when the Commission first notified Jones Eastern of its non-compliance with the main studio staffing requirements, until June 1991, when Jones Eastern purportedly implemented satisfactory staffing, Jones Eastern was in violation of the Commission's Rules. In any event, we have considered this earlier cessation of noncompliance in our redetermination of the forfeiture amount discussed below.

4. Jones Eastern also contends that it is being unfairly punished for violating a Commission rule during a period when the rule had "no concrete meaning whatsoever." We disagree with this assertion. In 1988 the Commission clearly stated that a broadcast licensee must maintain a "meaningful management and staff presence" at its main studio during normal business hours. *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd 5024, 5026 (1988). The fact that the Commission subsequently elaborated on what constitutes a "meaningful management and staff presence" does not render the prior standard meaningless. Indeed, the fact that Jones Eastern apparently corrected its deficient staffing in June 1991, before the Commission's subsequent clarification in 1992, indicates that Jones Eastern had sufficient guidance to comply with the main studio staffing requirement between October 1989 and June 1991. Furthermore, it should be noted that the NAL did *not* include any violation that may have occurred prior to October 27, 1989, when the Mass Media Bureau notified Jones Eastern that WRSF was not in compliance with the main studio staffing requirements. On October 27, 1989, the date we consider to be the beginning of noncompliance, we explained to Jones Eastern the staffing requirements and the manner in which WRSF fell short. Accordingly, we reject this argument.

5. Jones Eastern further contends that the Commission erroneously increased the forfeiture on the grounds that Jones Eastern's violation was "repeated and intentional," and that Jones Eastern reaped "substantial economic gain... through the evasion of costs required to comply with the rule." Jones Eastern contends that any "violation" between October 1989 and June 1991 was not repeated and intentional, but rather the result of delay in the Commission's disposition of Jones Eastern's Application for Review. Jones Eastern also asserts that there is no evidence that it "evaded" complying with the main studio staffing requirement for the purpose of reaping economic gain. We reject these arguments. Instead of responding to the Mass Media Bureau's October 1989 notice that the Jones Eastern's main studio staffing was inadequate and making a good faith effort to correct this deficiency, Jones Eastern chose to file an Application for Review, a process that can be lengthy and does not stay the effectiveness of the Mass Media Bureau's clear ruling that WRSF's operation violated the rule. The Commission is not sanctioning Jones Eastern for exercising its procedural options. During the pendency of this Application, Jones Eastern made no attempt to comply with the Commission's rulings and must bear the responsibility for this choice. Furthermore, with respect to its argument that there is no proof that Jones Eastern reaped economic benefit from its noncompliance, Jones Eastern concedes that by filing the Application for Review it was seeking a ruling that would be less expensive for it to implement. Therefore, it is reasonable for the Commission to conclude that Jones Eastern did in fact reap an economic benefit by intentionally failing to comply with the main studio staffing requirement between October 1989 and June 1991.

6. We will, however, reconsider the forfeiture amount because, in calculating the apparent monetary liability of $20,000, the NAL relied, in part, upon the standards of our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339, *revised*, 8 FCC Rcd 6215 (1993) ("Policy Statement"). These forfeiture standards have since been set aside by the United States Court of Appeals. *See United States Telephone Ass'n.*

v. *FCC*, 28 F.3d 1232 (D.C. Cir. 1994). Accordingly, we will directly apply to the specific circumstances of this case the statutory factors in Section 503(b)(2)(D) of the Communications Act, including the nature, circumstances, extent, and gravity of the violations. Our past decisions that predated the Policy Statement, and intervening legislative changes,[1] will also be relevant to this reconsideration.

7. To determine the appropriate monetary forfeiture for WRSF's main studio violation, we have reviewed the precedent and compared the seriousness of WRSF's main studio deviations with those in other main studio cases decided prior to the adoption of the Policy Statement, but also prior to the substantial increase in our forfeiture authority in 1989. These cases generally resulted in forfeiture amounts ranging from $5,000 to $10,000. In *Texas Key Broadcasters, Inc.*, 30 FCC 2d 146 (1971), the licensee was assessed a forfeiture of $5,000 for the relocation of its main studio without authority, a condition that lasted approximately two years. In *Broadcasting Service of America*, 38 RR 2d 552 (1976), the licensee was assessed a forfeiture of $5,000 for the unauthorized relocation of its main studio for a period of four weeks.[2] We also look to *International Panorama TV, Inc.*, 52 FCC 2d 258 (1975), assessing a forfeiture of $5,000, which involved the licensee's unauthorized relocation of its main studio for a period lasting approximately five weeks. In a more recent case, *The Dalton Group, Inc.*, 6 FCC Rcd 646 (1991), the NAL and Forfeiture Order (issued prior to the 1989 increase in our forfeiture authority) imposed a forfeiture of $10,000 for main studio, public inspection file, and program origination rule violations, conditions which lasted more than a year before being corrected by the grant of a modification application.

8. In the case before us now, the evidence indicates that the licensee was operating in violation of the main studio rule for more than one and a half years after being specifically advised by the Mass Media Bureau that its operation violated the rule, and also after having had its application for permission to relocate its main studio to the Nags Head location denied by the Commission. Additionally, as noted, the main studio violation forfeiture cases cited above were all decided before our forfeiture authority was significantly increased. Accordingly, we believe that a $12,000 forfeiture for WRSF's main studio violation is warranted.

9. Accordingly, pursuant to Section 503(b) of the Communications Act as amended, IT IS ORDERED that Jones Eastern of the Outer Banks, Inc., licensee of Radio Station WRSF(FM), Columbia, North Carolina, FORFEIT to the United States the sum of Twelve Thousand Dollars ($12,000) for the willful and repeated violation of 47 C.F.R. Section 73.1125. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum Opinion and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[1] In 1989, Congress amended Section 503(b) of the Communications Act. Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989). Among other things, the amendment increased the dollar amounts of this agency's forfeiture authority, to better serve as a meaningful sanction and deterrent to others. *See* Budget Reconciliation Act, House Conf. Rep. No. 386 at 435, *reprinted in* 1989 U.S. Code Cong. & Ad. News at 3038.

[2] In that case, the licensee was also found to have violated Section 74.631(a) by improperly utilizing a television remote pickup station, but the Commission stated that "in determining the amount of the forfeiture, it was primarily influenced by the unauthorized relocation" of the main studio. *Id.* at 553.

Dissenting Statement of
Commissioner James H. Quello

Liability of Jones Eastern of the Outer Banks, Inc.
Licensee of Station WRSF(FM), Columbia, North Carolina
For a Forfeiture

In my more than 20 years as an FCC Commissioner, I have always endeavored to bring to the job a sense of pragmatism born of my 30 years as a businessman, as well as a sense of fairness resulting from my 80 years as a citizen of these United States. Both of these instincts are offended by the forfeiture imposed in this case. I do not disagree with the finding that, in a technical legal sense, there was a violation of the main studio staffing requirement in this case. However, I do disagree with the imposition of a $12,000 forfeiture in light of the circumstances that led to the issuance of a Notice of Apparent Liability. In particular, I fail to see how a stiff fine is justified where the very rule that the licensee is charged with violating was twice clarified at various stages of this case. The old adage, "a moving target is harder to hit," should not apply to government regulation. Unluckily, Jones Eastern has learned the hard way that the vagaries of imprecision apply to many things in life, including in this case the main studio rule. For these reasons, I am compelled to respectfully dissent once again in this case. See Notice of Apparent Liability to Jones Eastern of the Outer Banks, Inc., Licensee, WRSF(FM), 7 FCC Rcd 7309 (1992) (Commissioner Quello dissenting).

The evolution of the current main studio staffing requirement and the evolution of this case are, not coincidentally, closely intertwined. The main studio rule requires that "(e)ach AM, FM and TV broadcast station . . . maintain a main studio within the station's principal community contour . . ." 47 C.F.R. Section 73.1125. In 1988, the Commission clarified what constitutes a main studio:

> A station must maintain a main studio which has the capability adequately to meet its function . . . of serving the needs and interests of the residents of the station's community of license. To fulfill this function, a station must equip the main studio with production and transmission facilities that meet applicable standards, maintain continuous program transmission capability, and **maintain a meaningful management and staff presence**.

Main Studio and Program Origination Rules (Clarification), 3 FCC Rcd 5024, 5026 (1988) (emphasis added) ("Main Studio Clarification").

In January 1989, shortly after the main studio staffing requirement was established, the Mass Media Bureau denied a request by Jones Eastern to relocate the WRSF main studio from Columbia, its city of license, to Nags Head, North Carolina,

outside the station's principal community contour. Seven months later, in response to a confidential complaint, the Bureau issued a letter of inquiry to Jones Eastern requesting information concerning the equipment and staffing at its main studio.

Jones Eastern advised the Bureau that the staff of its Columbia facility in 1989 included: (1) a full-time office manager (the Bureau subsequently determined that this employee was a receptionist and not a manager), who worked at the Columbia facility 8:00 a.m. to 5:00 p.m. Monday through Friday; (2) a business manager, who spent approximately four hours per week at the studio; (3) the station's general manager, who spent approximately two hours per week at the studio; and (4) a senior account executive, whose schedule at the studio was not provided. The business manager and the account executive were both residents of Columbia and, in addition to time spent in the studio, spent time in the community talking with Columbia residents and community leaders and participating in local civic activities. The full-time office worker helped conduct a survey of 125 of Columbia's 836 residents to obtain information for the production of a public affairs program. Jones Eastern submitted samples of WRSF's 1989 quarterly issues/programs list to show that these ascertainment efforts achieved the Commission's community service objectives.

On October 27, 1989, the Bureau found that, although WRSF's equipment was in compliance with Section 73.1125, its staffing was inadequate under the "meaningful management and staff presence" requirement set forth in the Main Studio Clarification. The Bureau ordered WRSF to take steps necessary to comply with the rule and to submit a progress report within 30 days. No clarification of what level of staffing constitutes a "meaningful management and staff presence" was provided in the Bureau's decision that could have provided Jones Eastern with specific direction in modifying its staffing at the Columbia studio. The only language that could be viewed even remotely as "guidance" was the following statement: "It appears that on a full time basis the studio has either a manager with no staff or a staff person with no management." Ref. 8310-TD.

In an apparent desire for a ruling by the Commission on the Bureau's interpretation of the vague requirement of a "meaningful management and staff presence," and left with continuing uncertainty about just what level of staffing would be deemed adequate, Jones Eastern filed an application for review of the Bureau's October 1989 decision. In it, Jones Eastern argued that the staffing at the Columbia facility was adequate under the 1988 requirement. Jones Eastern further urged that, should the Commission deem its current staff inadequate, it issue a declaratory ruling outlining the precise number of staff persons and work hours that constitute a meaningful presence.

On June 19, 1991, a year and a half later, the Commission denied Jones Eastern's application for review, ruling that the occasional oversight of the managers at the Columbia facility did not constitute a meaningful presence. However, the Commission at the same time recognized that the main studio staffing requirement was in need of clarification, and therefore established for the first time that a main studio staff should consist of "full-time managerial and full-time staff personnel." The Commission also indicated that:

> This is not to say that the same staff person and manager must be assigned full-time to the main studio. Rather, there must be management and staff presence on a full-time basis during normal business hours to be considered "meaningful."

6 FCC Rcd. 3615, 3616 (1991).

Armed with its first concrete indication from the Commission as to what specifically constitutes a "meaningful management and staff presence," Jones Eastern that same month implemented a new staffing proposal. The new main studio staff consisted of: (1) a full-time office worker; (2) a full-time chief engineer who also acted as the station's news director during morning and afternoon drive time; and (3) various account executives and the station manager who worked at the Columbia facility several days a week. Jones Eastern filed a petition which sought Commission reconsideration of its June 1991 decision in light of its new staffing, and further clarification of the staffing requirement.

This petition for reconsideration was denied in an October 14, 1992 Commission order. However, Jones Eastern's new staffing levels were determined to be adequate, and clarification of the persistently vague main studio staffing requirement was once again deemed necessary. In response to specific questions posed by Jones Eastern and the National Association of Broadcasters (which filed comments in support of Jones Eastern's request for clarification), the Commission clarified what categories of positions would constitute a "meaningful managerial presence" at the main studio. The Commission also clarified that:

> Because some of these positions may require the persons occupying them to conduct significant business outside the office, we would not, of course, require management personnel to remain "chained to their desks" during normal business hours. Rather, we require that management personnel report to work at the main studio on a daily basis, spend a substantial amount of time there and, unlike Jones Eastern's "ghost management," use the studio as a "home base." Ultimately, that management presence must remain responsible for whatever station operations occur from that studio. To the extent that the staff person may

> fully perform its station functions with time to spare, and coverage of the main studio permits, that person may also take on responsibilities for another business, as long as the main studio remains attended during normal business hours.

7 FCC Rcd 6800, 6802 (1992). For the first time since the 1988 main studio staffing requirement was adopted, broadcasters were provided with a complete picture of what the Commission meant by a "meaningful management and staff presence."

Despite the previous ambiguity surrounding the main studio staffing requirement, the Commission (minus this Commissioner's vote) just one month later issued a $20,000 Notice of Apparent Liability for Forfeiture ("NAL") to Jones Eastern. 7 FCC Rcd 7309 (1992). The Memorandum Opinion and Order ("MO&O") adopted today (again minus this Commissioner's vote) affirms the imposition of a forfeiture but adjusts the amount downward to $12,000 in light of the fact that the United States Court of Appeals set aside the forfeiture standards on which the Jones Eastern decision was based, and in recognition of the fact that Jones Eastern implemented its new staffing proposal in June of 1991. The $12,000 forfeiture is therefore based on the approximately 18-month period between October 27, 1989, when the Bureau first notified Jones Eastern that its staffing was inadequate, and June 1991, when the Commission first ruled on the adequacy of Jones Eastern's staffing, and provided the first of two clarifications of the vague "meaningful management and staff presence" requirement.

The Commission noted in the NAL and in the instant MO&O that Jones Eastern did not seek to have enforcement of the main studio staffing requirement stayed during this period in which it was awaiting Commission guidance.

And so we arrive at the end of this tortured saga and learn that, had Jones Eastern filed with its application for review a motion for stay and maintained its 1989 staffing levels until the Commission clarified the main studio staffing requirement in 1991, presumably it would have avoided the imposition of a forfeiture. Instead, Jones Eastern filed an application for review without a motion for stay, maintained its 1989 staffing levels, and waited for a much-needed Commission ruling on its application for review and request for clarification. For the cardinal sin of not filing a motion for stay, Jones Eastern is directed to pay $12,000 into the Federal Treasury.

Where does this leave us? I think we can all agree that the main studio staffing requirement was in need of clarification: hence, two decisions clarifying the requirement. I think we can also agree that Jones Eastern's 1989 staffing levels were not consistent with the spirit of the main studio rule. (However,

from my years in business, I do not view Jones Eastern's interpretation as entirely unreasonable.) Finally, we should all be able to agree that Jones Eastern sought clarification from the Commission of the rule it was charged with violating.

I part company with my colleagues, however, in their conclusion that a $12,000 forfeiture should be imposed for Jones Eastern's failure to formally file a motion for stay of enforcement of this admittedly vague rule pending clarification. Once Jones Eastern was notified by the Bureau that its main studio staffing was inadequate, it appealed that decision but also requested clarification of the subject rule in the event its appeal was denied. In short, it is readily apparent that Jones Eastern intended to comply with the Commission's ultimate determination regarding the WRSF main studio staffing as soon as it pursued its statutory right to appeal the Bureau's decision, and as soon as it figured out what, exactly, our rules required.

Are we so rigid that we could not, during the eighteen months in which it took the Commission to rule on the application for review and request for clarification of the main studio staffing requirement, excuse Jones Eastern from a large forfeiture for failing to formally request that enforcement be stayed? Could we not have inferred in the filing of an application for review an inherent request for stay? Could we not, instead, have strongly admonished Jones Eastern, even issued a minimal forfeiture, for failing to comply adequately with the spirit of the main studio staffing requirement and allowed them to go on, appropriately chastened, with the business of broadcasting? It is with the Commission's failure in this case to dispense pragmatically fair justice with which I am compelled to respectfully dissent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Washington County	CSR-4426-M
Television, Inc. against	OK0062
DR Partners, d/b/a Donrey Cablevision	OK0063

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 1995; Released: April 4, 1995

By the Cable Services Bureau:

I. INTRODUCTION

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) became law.[1] On March 11, 1993 the Commission adopted a *Report and Order* to implement the mandatory broadcast signal carriage ("must-carry") provisions of the Cable Act.[2] Pursuant to the rules adopted in the *Report and Order*, cable systems were required to commence carriage of local broadcast stations entitled to must-carry status beginning June 2, 1993.[3] Our must-carry rules are also applicable to qualified low power television stations (LPTV).[4] On December 12, 1994, Washington County Television, licensee of LPTV K66EK, Bartlesville, Oklahoma (K66EK) submitted the present complaint against DR Partners, d/b/a Donrey Cablevision (Donrey) alleging the latter's improper denial of carriage on its Bartlesville, Oklahoma and Dewey, Oklahoma cable systems. Donrey responded on January 9, 1995 by alleging that complainant does not satisfy the definition of a qualified LPTV, and that even if it did, complainant's must-carry request is invalid based on its prior election to negotiate for retransmission consent.

II. DISCUSSION

2. Our must-carry rules state that if there are not enough full-power local commercial television stations to fulfill the must-carry obligations of a cable system, a qualified LPTV may be carried.[5] One of the criteria for being a qualified LPTV is that there be "no full power television broadcast station licensed to any community within the county or other equivalent political subdivision (of a State) served by the cable system."[6] Donrey states that there is a full-power local commercial broadcast station (KDOR) licensed to Bartlesville, Oklahoma, which is within the same county (Washington) as Donrey's Bartlesville and Dewey systems and, thus, complainant is not a qualified LPTV. In its Complaint, K66EK acknowledges that KDOR is licensed to Bartlesville, but argues that because KDOR's studio is located in Broken Arrow, Oklahoma, 60 miles from Bartlesville, and KDOR's transmitter is located in Rogers County, Oklahoma, "KDOR's programming service to Bartlesville and Dewey is no more evident than that of the other eight full power stations located in and around Tulsa."[7] In addition, K66EK requests a waiver of Section 76.55(d)(6) of the Commission's rules to permit K66EK to be considered a qualified LPTV despite the fact that there is a full power television broadcast station licensed to Bartlesville, Oklahoma.

3. The criteria for a qualified LPTV, as set forth in the Commission's rules, are mandated by Section 614(h)(2) of the 1992 Cable Act. While the Commission may waive its own rules in certain circumstances, it may not waive any part of the statutory definition of a qualified LPTV. Because there is a full power television broadcast station licensed to Bartlesville, Oklahoma, K66EK does not meet the criteria for a qualified LPTV, and therefore K66EK is not entitled to carriage on Donrey's Bartlesville and Dewey systems. Given our conclusion, we need not reach the other issues raised by the parties in this matter.

4. Accordingly, the petition filed on December 12, 1994, by Washington County Television, K66EK, Bartlesville, Oklahoma, IS DENIED, in accordance with Section 614(h)(2)(F) (47 U.S.C. 534) of the Communications Act of 1934.

5. This action is taken by the Cable Services Bureau, pursuant to authority delegated by Section O.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993). *See also Clarification Order*, 58 FR 32449 (June 10, 1993). 47 U.S.C. § 535. *Compare with Turner Broadcasting System, Inc. v. Federal Communications Commission*, ___S. Ct.___ (June 27, 1994) (remand of District Court opinion that must-carry provision of 1992 Cable Act is constitutional).

[3] 47 C.F.R. § 76.56(a) and (b).

[4] 47 C.F.R. § 76.55(d); § 76.56(b)(3) and (4).

[5] 47 C.F.R. § 76.56(b)(3). Cable systems with 35 or fewer channels shall carry one (1) qualified LPTV, and systems with 35 or more channels shall carry two (2).

[6] 47 C.F.R. § 76.55(d)(6).

[7] Complaint at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Busse Broadcasting Corporation CSR-3950-A
Lincoln, Nebraska

For Modification of Stations
KOLN's and KGIN's ADI

MEMORANDUM OPINION AND ORDER

Adopted: March 28,1995; Released: April 4, 1995

By the Cable Services Bureau:

I. INTRODUCTION

1. In the captioned proceeding, Busse Broadcasting Corporation ("Busse"), licensee of Television Broadcast Station KOLN (CBS, Channel 10), Lincoln, Nebraska, and of its satellite, KGIN (CBS, Channel 11), Grand Island, Nebraska, has requested the Commission to add certain Nebraska cable communities to the Lincoln-Hastings-Kearney, Nebraska area of dominant influence ("ADI") to which both stations are currently assigned.[1] Busse's petition is unopposed.

II. BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI area. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

> The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the

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[1] The communities are as follows: Brunswick, Clearwater, Elgin, Neligh, Oakdale, and Orchard (in Antelope County); Bellwood, Brainard, David City, Dwight, Rising City, and Ulysses (in Butler County); Cook, Sterling, and Tecumseh (in Johnson County); Creston, Columbus, Duncan, Humphrey, Lindsey, and Monroe (in Platte County); and (in Seward County), Beaver Crossing, Bee, Garland, Goehner, Milford, Pleasant Dale, Seward, Staplehurst, and Utica.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[6] 47 U.S.C. §534(h)(1)(C)(ii). As Congress recognized, "[t]hese factors are not intended to be exclusive . . . ." H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.[7]

5. The Commission provided guidance in *MM Docket 92-259, supra*, to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by- county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

III. MARKET FACTS AND BUSSE'S ARGUMENTS

7. The five counties specified by Busse are all located on the eastern border of the Lincoln-Hastings-Kearney ADI. At present, the Counties of Butler, Johnson, Platte, and Seward are all assigned to the Omaha, Nebraska ADI, while Antelope County is part of the ADI for Sioux City, Iowa. According to Busse, all fourteen specified cable communities in Butler and Seward Counties are located within KOLN's Grade A contour, and the nine specified cable communities in Johnson and Platte Counties are all within KOLN's Grade B contour. Busse adds that the six specified cable communities in Antelope County are located within the service area of its 1,000 watt television translator station at Neligh (K28AP), and that Lincoln, KOLN's city of license, is actually located closer to the listed communities than is the metro area of their designated ADI's, Omaha and Sioux City.

8. According to Busse, either KOLN or KGIN is presently carried by the cable system serving every cable community it has listed, and Busse notes that 23 of the 30 listed cable communities have carried either KOLN or KGIN since 1992. Since Lincoln is the state capital, KOLN adds that it has immediate access to the state government news that it reports daily, as well as the news it broadcasts concerning agriculture, including weather and farm market reports. In addition, since there are no major league professional teams in the area, Busse's emphasis on coverage of the University of Nebraska teams and of area high school sports is essential. Busse adds that it is unlikely that the other stations assigned either to the Omaha or to the Sioux City ADI have provided the quality or the depth of coverage to the listed communities that it has through the years, simply because they are located so far from these areas, in some cases as much as 75 miles.[11] Since KOLN is the only commercial station licensed to Lincoln, it is able to provide daily coverage of the Nebraska state government, thus promoting the diversity of views which was recognized in Section 2(a)(6) of the 1992 Cable Act as having "substantial governmental and First Amendment interest". Busse notes that the Commission recognized KOLN as significantly viewed in each of the five counties at issue when it initially released its list of such signals in 1972,[12] and Busse submits county-wide 1992 Arbitron data to demonstrate that it continues to enjoy wide-spread support,[13] noting that in each of the five contested counties, "KOLN has the largest market share and the largest share of news viewing by a wide margin."

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[7] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

[8] *MM Docket 92-259*, 8 FCC Rcd at 2977.

[9] *MM Docket 92-259*, 8 FCC Rcd at 2977, n.6139.

[10] 47 C.F.R. §76.59.

[11] To support its claim, Busse submits several lists of news items on which it reported between April 1992 and April 1993 concerning events in the five counties where the listed communities are located. For Antelope County, it broadcast 16 items; it broadcast 24 items about events in Butler County; for Johnson County, it aired 11 items; Busse broadcast 54 items about events in Platte County; and it aired 32 items concerning events in Seward County.

[12] For a network station to be deemed significantly viewed in a community or in a county, it must achieve in noncable homes a share of viewing hours of at least 3 percent (total week hours) and a net weekly circulation of a least 25 percent. 47 C.F.R. Section 76.5(i). According to Arbitron's 1993 report *Television County Coverage: Nebraska*, KOLN currently has a 50 share and a 90 net weekly circulation off-air in Platte County, and a 43 share and a 86 net weekly circulation off-air in Seward County; Arbitron did not report any off-air viewing for the other three counties.

[13] Recognizing that the Commission previously requested community-specific data, rather than county-wide data, Busse explains that, in this instance, county-wide data should be statistically reliable, because it ". . . is seeking to add all of the communities in each county. . . ." At the same time, Busse notes that even though the county-wide data could be broken down by zip code (thus approximating community data), the resulting number of diaries would be so small that any data based on it would not be statistically reliable.

IV. ANALYSIS AND DECISION

9. As described more fully below, KOLN has shown that the communities at issue are part of its economic marketplace. With regard to long term carriage, KOLN has shown that cable systems serving 23 of the 30 communities at issue have carried KOLN or its satellite station KGIN since 1992. With regard to the remaining three communities, KOLN notes that all are currently carrying it. While we recognize that KOLN has not shown a history of carriage in these three communities, we believe nevertheless that the other factors taken as a whole warrant the relief requested. In addition, no party has filed an objection to KOLN's requested modification of the Lincoln-Hastings-Kearney ADI as it relates either to KOLN or to KGIN, even though the communities listed in the five counties in question are at least partially located within the Grade B contour of eight other commercial television broadcast stations.[14] Busse has also demonstrated how its programming serves the needs and interests of many of these communities. In addition, each of the communities listed in four of the five counties is located close to KOLN's city of license and within either its Grade A or Grade B contour, and Busse operates a television broadcast translator station serving Antelope, the remaining county.[15] Although WNEM-TV has not fully addressed the third statutory factor -- whether other stations entitled to carriage provide news and other programming of concern or interest to the communities in question -- we do not believe that Congress intended this criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue, but rather that this criterion was intended to enhance a station's claim where it could be shown that other stations *do not* serve the communities at issue.

10. Finally with respect to the viewership issue, the most recent data reported by Arbitron for 1993 in its study *Television County Coverage: Nebraska (Standard/Fringe)* confirms that KOLN has by far the largest market share in each of the five counties,[16] in addition to the largest share of news viewing, both early and late.[17] This data does not separate viewing attributable to KOLN from that attributable to KGIN, since the latter station is a 100% satellite of the former station, and both stations broadcast essentially the same programming.[18] Therefore, although we will add the communities requested in Butler, Johnson, Platte, Seward, and Antelope Counties to the ADI for each station, we note that for purposes of mandatory signal carriage, cable operators will be required to carry only one of the two stations because as defined by the Commission's mandatory carriage rules, KOLN and KGIN carry duplicative programming. *See* Section 76.56(b)(5) of the Commission's Rules.

V. ORDER

11. Accordingly, IT IS ORDERED, pursuant to Section 614(h)(1)(C) of the Communications Act of 1934, as amended, (47 U.S.C. 534(h)(1)(C)), That the petition for special relief (CSR-3950-A), filed July 7, 1993, by Busse Broadcasting Corporation IS GRANTED.

12. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[14] The eight other Nebraska television stations are as follow: KCAN (ABC, Ch. 8), Albion; KHAS-TV (NBC, Ch. 5), Hastings; KHGI-TV (ABC, Ch. 13), Kearney; KSNB-TV (ABC, Ch. 4), Superior; and from Omaha, KETV (ABC, Ch. 7); KMTV (CBS, Ch. 3); KPTM (Ind., Ch. 42); and WOWT (NBC, Ch. 6).

[15] Because we believe that ADI's should reflect the existing economic marketplace in as accurate and as complete a way as possible, we will add the communities requested in Antelope County both to KOLN's and to KGIN's ADI.

[16] In Antelope, KOLN's total share of county viewing is 36%; in Butler, it's 39%; in Johnson, it's 35%; in Platte, it's 32%; and in Seward, it's 35%. By comparison, the station with the closest total share of county viewing in Antelope is KCAN with 15%; in Butler, it's KETV with 12%; in Johnson, it's KETV with 17%; in Platte, it's KETV with 10%; and in Seward it's KETV with 15%.

[17] We recognize that this data is county-wide rather than community-specific. However, we have previously stated that we will accept such data as probative, although not conclusive, in cases of this type, absent evidence that such data are not fairly reflective of viewing in the actual communities in question. *See, RKZ Television, Inc.*, 8 FCC Rcd 8008, 8010 (1993).

[18] On p. ii of the *Introduction* to its report, Arbitron provides the following explanation: "S-1 Satellites are satellite stations which, subject to the circumstances noted below, simultaneously rebroadcast 100 percent of the parent station's programming. For purposes of this policy, the S-1 Satellite must rebroadcast programming (exclusive of commercials) of the parent station in its entirety. * * * * Viewing hour estimates are always reported in combination with the parent station. A'+' next to the parent's call letters indicates the combined viewing hour estimates of the parent and the S-1 Satellite."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Change in Number of Classes of Amateur Operator Licenses. RM-8391

ORDER

Adopted: March 28, 1995; Released: April 4, 1995

By the Chief, Wireless Telecommunications Bureau:

1. On April 20, 1994, the Acting Deputy Chief, Private Radio Bureau, denied a petition for rule making, RM-8391, filed by Mr. Rolf Jespersen. The petition was denied because there was insufficient evidence to justify revisiting the issues concerning the number of amateur operator classes and examination requirements. The petitioner had proposed that the present six classes of operator licenses be reduced to three, only two of which would require telegraphy proficiency. No comments were filed in response to his petition (RM-8391). On May 26, 1994, Mr. Jespersen filed a timely petition for reconsideration of the denial.

2. In support of his petition for reconsideration, Mr. Jespersen states that: (a) supporters did not know when to file supporting comments; (b) telegraphy "ability," not necessarily telegraphy "proficiency," should be the criterion for the class of operator license obtained; (c) the previous rule making proceedings showing the desire of the amateur community to preserve communications by telegraphy were not documented; and (d) the rule changes that he suggested would promote growth in the amateur community and reduce delays in obtaining new and upgraded licenses.

3. A Public Notice listing RM-8391 was released on November 30, 1993. The Public Notice was available to the public in the Commission's Reference Room (Room 239) upon its release, and also in the Commission's Press Room (Room 259) on the release date. Statements supporting or opposing the petition could have been filed within 30 days and the public was so advised in the Public Notice.

4. The petitioner's request that the Commission establish three classes of operator licenses is a request that asks the Commission to revisit several of its decisions regarding the structure, requirements, privileges and license classes of the amateur service. For example, in 1951, the Commission established the basic operator class structure. *See Report and Order* in Docket No. 9295, 16 Fed. Reg. 1237 (1951). In 1967, the Commission reduced the code speed for the Advanced Class operator license to 13 words per minute and decided to retain the Amateur Extra Class license. *See Report and Order* in Docket No. 15928, 32 Fed. Reg. 12682 (1967). The nature of the amateur service was again examined in December, 1983, when the Commission declined to establish a class of amateur operator license without a telegraphy requirement. *See Report and Order* in PR Docket No. 83-28, 49 Fed. Reg. 1097 (1984). The subject was revisited in 1990 when the Commission established an entry-level, codeless class of operator license and the amateur community confirmed its preference of preserving telegraphy as an examination requirement for the remaining operator license classes. The amateur service community in the United States generally considers the current telegraphy speed requirements as necessary and appropriate. *See Report and Order* in PR Docket No. 90-55, 5 FCC Rcd 7631 (1990).

5. The license class structure has not precluded growth in the amateur service. In 1950, there were 87,696 licensees, now there are 668,258. Moreover, past delays in issuing licenses are being substantially removed by the volunteer-examiner coordinator system and the electronic filing of license applications.

6. Accordingly, we affirm that the reasons advanced in the petition for rule making and in the petition for reconsideration are insufficient to justify revisiting the issues concerning the number of amateur operator classes and examination requirements at this time. Accordingly, pursuant to Section 1.106(a)(1) and (j) of the Commission's Rules, 47 C.F.R. § 1.106(a)(1) and (j), the petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: April 4, 1995

CHAMPLAIN VALLEY TELECOM, INC., VERMONT TELEPHONE COMPANY, INC., AND NORTHLAND TELEPHONE COMPANY OF VERMONT FILED A JOINT PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, APPENDIX-GLOSSARY, OF THE COMMISSION'S RULES AAD 95-30

Comment Date: May 15, 1995
Reply Date: May 30, 1995

On February 14, 1995, Champlain Valley Telecom, Inc. ("Champlain"), Vermont Telephone Company, Inc. ("Vermont") and Northland Telephone Company of Vermont ("Northland")(collectively, "Petitioners") filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the Petitioners to reconfigure their study area boundaries. Petitioners state that this waiver is needed as a final step in a process that began with the recent sale of 30 telephone exchanges (35,173 access lines) by Contel of Vermont, Inc. in July 1994, to WFT Acquisition Company ("WFTA"). WFTA was owned by three shareholders: Vermont, Northland and Nordcom Communications, Inc., the corporate parent of Champlain. Immediately after the sale, the properties were divided among Champlain, Vermont and Northland, that are now operating independently as local exchange carriers. Petitioners state that this sale transaction has been approved by the Vermont Public Service Commission.

Interested parties may file comments on the petitioners' petition on or before **May 15, 1995**, and reply comments on or before **May 30, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 95-30. Four (4) copies should also be sent to Adrian Wright, Cost analysis Branch, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* , 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1208-1.1218. For further information contact Adrian Wright at (202) 418-0830.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 4, 1995

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NECA'S 1995 FURTHER MODIFICATIONS OF AVERAGE SCHEDULE FORMULAS AND ERRATA AAD 95-2

Comment Date: April 14, 1995
Reply Date: April 21, 1995

On December 30, 1994, the National Exchange Carrier Association, Inc. ("NECA") filed modifications to the average schedule formulas to become effective July 1, 1995. These interstate average schedule formulas compensate more than six hundred local exchange carriers for the use of their facilities in originating and terminating interstate common carrier communications.

On March 17, 1995, NECA filed a further modification and errata to its proposed 1995 average schedules. NECA states that this filing would modify the Traffic Sensitive central office formula submitted on December 30, 1994, to more accurately reflect the per-unit cost of switching interstate access traffic and to improve the distribution of central office settlements. NECA states that the revised central office settlement formula would replace the formula it filed in December 1994 and that it would become effective on July 1, 1995. NECA states that this modification would more accurately reflect the costs of providing local switching services for interstate access, and would result in a redistribution of central office settlements from a small number of average schedule study areas with high traffic volumes, to a large number of study areas with lower traffic volumes. In addition, NECA asserts that under this modification existing high traffic volume study areas will experience material settlement decreases, while many study areas with lower traffic volumes will experience slight settlement increases. NECA states, however, that total settlements for all average schedule companies would remain unchanged as a result of its further modification filed on March 17, 1995.

On March 17, 1995 NECA also filed an errata, in which it states that its December 30, 1994 filing contains "an erroneous result" for a Cost of Billing for Interstate Access Services (CABS) regression model. NECA states that the erroneous result does not impact the proposed formulas.

Finally, NECA's further modification requests Commission approval for a one-time settlement to permit average settlement companies to recover the costs associated with the Commission's Universal Service Fund ("USF") Data Request. NECA states that the related costs incurred by carriers that comply with the Commission's USF Data Request should be recovered through a one-time $2,478 payment to each average schedule company.

Parties may file comments concerning the further NECA modification of average schedules and errata no later than **April 14, 1995**. Reply comments should be filed by **April 21, 1995**. All filings should reference AAD 95-2. An original and five (5) copies of each pleading should be sent to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C., 20554. Copies of each filing should also be sent to Bob Hall, Rafi Mohammed and Adrian Wright, Cost Analysis Branch, Accounting and Audits Division, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C., 20037. A copy of each filing is available for inspection and copying in the Accounting and Audits Division's public reference room at the 2000 L Street address shown above. Copies are also available from ITS, Inc. at 202/857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1216. For further information contact Bob Hall, Rafi Mohammed or Adrian Wright, Cost Analysis Branch, Accounting and Audits Division, Common Carrier Bureau, at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: April 5, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Clear Channel Television, Inc. 1800E
Licensee, KTTU(TV)
1855 North 6th Avenue
Tucson, Arizona 85705

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of one hundred twenty-five thousand dollars ($125,000) pursuant to § 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming. In addition, KTTU(TV) will be subject to reporting conditions and will have its license renewed for a two-year term.

In response to the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, the Commission adopted rules and policies limiting the amount of commercial time which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. 47 C.F.R. § 73.670. The Commission also stated that it would consider in its review of television station license renewals the extent to which the licensee had complied with these commercial limits. *Children's Television Programming*, 6 FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991). The commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529 (1991).

On June 1, 1993, you filed an application for renewal of license for KTTU(TV), Tucson, Arizona (BRCT-930601LB). You also filed a supplement to FCC Form 303-S which contains questions to determine whether the licensee has complied with the limits on commercial matter as set forth in 47 C.F.R. § 73.670. In this supplement, you indicated that KTTU(TV) had failed to comply with the limitations on commercial matter during children's programming during your last license term.

Specifically, in Exhibit 4 to KTTU(TV)'s renewal application, you indicated that KTTU(TV) exceeded the limitations on commercial matter during children's programming on 581 occasions during its last license term. Of these commercial overages, nine were four minutes to five minutes in length, 41 were three minutes to three minutes and 50 seconds in length, 90 were two minutes to two minutes and 50 seconds in length, 235 were one minute to one minute and 50 seconds in length, and 206 were less than one minute in length.

You indicated that you first became aware of a potential problem with commercial overages on KTTU(TV) in April of 1993 when you received a letter from the Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, as a result of a November 1992 audit. The letter questioned whether a commercial overage had occurred on Sunday, November 15, 1992, between 8 and 9 AM. In response, you stated that all of the children's programming and associated commercials broadcast on KTTU(TV) subsequent to October 6, 1991, were provided by Mountain States Broadcasting, Inc. ("Mountain States"), licensee of KMSB-TV, Tucson, Arizona, pursuant to the terms of a time brokerage agreement. Accordingly, you claimed that it was necessary for you to contact Mountain States in order to determine the amount of commercial matter that had been aired on your station.

Mountain States, the program supplier, launched an investigation of the amount of commercial matter aired during children's programming on KTTU(TV) and informed you of the results. A copy of Mountain States' written report was submitted with your renewal application. This report first revealed the 581 instances of excess commercial matter which occurred between January 1, 1992, and April 23, 1993. While you and Mountain States conceded a number of mistakes, omissions and unintention- ally inadequate procedural practices, you both denied any intent or design to violate the children's commercial limits.

You also acknowledged that your practices with respect to monitoring the commercial levels present in the children's programming provided to KTTU(TV) by Mountain States were not adequate. You stated that you now realize that as the licensee of KTTU(TV), you are responsible for monitoring the levels of commercial matter broadcast during children's programming. Moreover, you admitted that by not monitoring such programming more closely, you "fell down on [the] job."

It appears that you, as the licensee, relied entirely on Mountain States for compliance with the commercial limits. Mountain States claims that its standard operating procedure called for the Traffic Supervisor to prepare program schedule lists that showed programs and the breaks for non-program material, including the extent to which such breaks could be used for commercial matter. The Traffic Supervisor also incorporated commercial restrictions that applied during children's programming into the computer system used to schedule KTTU-TV's broadcast time. The Traffic Supervisor told Mountain States' management that these procedures would effectively prevent commercial overages during children's programming. While Mountain States' Director of Programming and Operations met with its staff responsible for programming KTTU(TV) and passed along at least six memoranda concerning children's commercial requirements, apparently these instructions were not conveyed to all pertinent station traffic personnel. Moreover, new traffic personnel were not provided with appropriate information concerning children's commercial requirements.

In addition, Mountain States stated that the information entered into the computer by its Traffic Supervisor was incorrect because it did not properly account for barter commercial spots in children's programs. Moreover, when the amount of barter spots in a program changed, the computer was not changed and would thereafter incorrectly authorize, on a recurring basis, commercial time in excess of the Commission's limits. Errors were also attributed to the fact that the responsibility for preparing scheduling was turned over to improperly trained staff. Other errors occurred when traffic personnel overrode the formatted schedules and inserted commercials over PSAs or

other promotional spots for station programs which are not counted as commercials. Again, this was attributed to improper training. More overages occurred because the programs were formatted to limit the amount of commercials to 12 minutes per hour. Thus, programs aired on weekends when the limits were 10.5 minutes per hour often contained commercial overages. Finally, Mountain States' traffic staff aired many promos that included mention of a sponsor's name and should therefore have been considered commercial time, but were not. Again, inadequate training was blamed for this error. Neither you nor Mountain States discovered any of these problems which resulted in this extraordinary number of commercial overages until the matter was brought to your attention by a letter from the Commission.

You indicate that Mountain States has now adopted procedures designed to preclude future commercial overages. You claim that children's programs have now been correctly formatted in the computer and that staff has been properly instructed. Moreover, you state that there are redundant procedures in place to preclude overages. You state that as the licensee, you have also sent a management representative to consult with Mountain States about its remedial procedures. You indicate that you now check Mountain States' program logs to verify compliance and have instituted a process of randomly monitoring children's programming to count the commercial minutes. You advise that you have hired a new general manager at KTTU(TV), replacing the one who had incorrectly indicated that KTTU(TV) was in compliance with the Commission's commercial limits and who failed to maintain accurate and complete children's television programming records in the station's public file. Finally, you state that you have increased the amount of educational and informational programming on KTTU(TV), in part, as a form of recompense for past commercial overages.

KTTU(TV)'s record of exceeding the Commission's limits on commercial matter during children's programming on 581 occasions constitutes a willful and repeated rule violation. Accordingly, pursuant to § 503(b) of the Communications Act, Clear Channel Television, Inc., is hereby advised of its apparent liability for a forfeiture in the amount of one hundred twenty-five thousand dollars ($125,000) for its apparent willful and repeated violation of 47 C.F.R. § 73.670. The amount specified was reached after consideration of the factors set forth in §503(b)(2) of the Communications Act, and in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compliance; and (5) the specific reasons that the licensee gives for the overages. These criteria have been used by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); and *KXRM Partnership*, 8 FCC Record 7890 (1993). A recent court decision set aside a *Policy Statement* that we have used since 1991 as a guideline for assessing forfeitures. *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon, denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993). In *United States Telephone Ass'n v. FCC*, No. 92-1321 (D.C. Cir. July 12, 1994), the court indicated that the *Policy Statement* must be put out for public comment to comply with Administrative Procedure Act. The Commission will act on the court's Order in a separate proceeding. While the criteria considered in connection with commercial overages were developed in cases decided under the *Policy Statement*, they were not inherently tied to the *Policy Statement*. Without regard to the *Policy Statement*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming since, they take into account *inter alia*, "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability," as required under Section 503(b)(2)(1) of the Communications Act, as required.

The 581 occasions on which KTTU(TV) exceeded the hourly limits on commercial matter during children's programming is an extraordinarily high number of violations. Moreover, 375 of the overages were one minute or more in length. Overages of this magnitude and duration mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it adopted the Children's Television Act of 1990. *Children's Television Programming*, 6 FCC Rcd at 2117-18. The number and duration of the overages by KTTU(TV) far exceeds any previous violations the Commission has seen. For instance, in *Paramount Stations of Houston, Inc.*, 9 FCC Rec 140 (1993), the licensee exceeded the commercial limits on 132 occasions of which 19 were one minute or more in length and 73 were program length commercials. Moreover, in *Koplar Communications, supra*, the licensee exceeded the commercial limits on 197 occasions of which §123 were one minute or more in length. The number and duration of the commercial overages on KTTU(TV) warrant a very significant forfeiture amount.

Furthermore, it appears that you did not take any actions to preclude commercial overages during children's programming on KTTU(TV) until after the problem was brought to your attention by the Commission, nearly 15 months after the commercial limits became effective. You did not set up procedures to ensure compliance, nor did you establish procedures to monitor compliance. Instead, you relied entirely upon Mountain States, pursuant to a time brokerage agreement, to implement compliance procedures. In other cases licensees have often discovered their own commercial overages and taken corrective action to preclude future overages. For instance, in *Koplar Communications, supra*, 193 out of the 197 overages occurred during the first four months the commercial limits went into effect and before corrective action was taken. Similarly, in *Independent Communications Inc., supra*, 108 of the 121 commercial overages occurred in the first six months after the commercial limits went into effect and before the licensee discovered the overages and made changes to its compliance procedures. However, at KTTU(TV) it does not appear that the licensee made any efforts at compliance with the commercial limits until after the overages were brought to its attention by the Commission.

The length and repeated nature of these overages, the period of time during which such overages occurred, and the lack of an effective monitoring program constitute egregious misconduct. Finally, the extremely large number of commercial overages constitutes aggravated repetition of the violation. The children's commercial limit violations which occurred at KTTU(TV) are the most serious the Commission has seen. Consideration of these factors warrants a substantial forfeiture amount.

There do not appear to be any mitigating factors warranting a reduction in the amount of the forfeiture. When the Commission delayed the effective date of 47 C.F.R. § 73.670 until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to e sympathetic to claims of difficulties." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. KTTU(TV) has not proffered any extraordinary transitional or other difficulties that prevented it from complying with the commercial limits during its license period. Instead, the violations appear to result from KTTU(TV)'s failure to communicate effectively to station staff and its time broker the need for strict compliance with the commercial limits and its failure to monitor and review adequately the station's performance in this area.

Given the extraordinary breadth of the violations in this case and the substantial failure of the licensee to establish monitoring and compliance procedures, we believe that additional remedial measures are warranted in order to ensure that Station KTTU(TV) complies with our limitations on commercials during children's programming in the future. First, we will impose reporting conditions. During its next license term, KTTU(TV) will be required to report to the Commission, on a quarterly basis, whether it has complied with our limits on commercial matter during children's programming. Moreover, any noncompliance will have to be described in detail. Second, your license will be renewed only for a term of two years. This will afford the Commission an opportunity to review your ability to comply with our commercial limits and to take whatever corrective actions, if any, that may be warranted at that time.

Notwithstanding the substantial nature of the violations at issue here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith and we do not believe they reflect a deliberate disregard for Commission requirements. Accordingly, we do not believe that these violations are an impediment to grant of the application for renewal of license for Station KTTU(TV). Therefore, the license renewal application of Clear Channel Television, Inc., BRCT-930601LB, IS HEREBY GRANTED for a term to end April 1, 1997, subject to the condition that:

Station KTTU(TV) shall submit to the Commission an original and one copy of the following information within thirty (30) days after the end of each calendar quarter:

(a) A statement certifying whether the licensee has complied with the limits on commercial matter as set forth in 47 C.F.R. § 73.670.

(b) A list of each segment of programming, 5 minutes or more in duration, designed for children 12 years old and under and broadcast during the license period which contained commercial matter in excess of the limits set forth in 47 C.F.R. § 73.670. For each such programming segment so listed, indicate the length of the segment, the amount of the commercial matter contained therein, and an explanation of why the limits were exceeded.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the release date of this document "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of § 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on March 10, 1995.

BY DIRECTION OF THE COMMISSION*

William F. Caton
Acting Secretary

*Commissioner Quello concurring and issuing a statement.

Attachments
cc: Joel H. Levy, Esquire

Concurring Statement of
Commissioner James H. Quello

WSEE-TV, Erie, PA, Notice of Apparent Liability
KTTU(TV), Tucson, AZ, Notice of Apparent Liability
Excess Commercials During Children's Programming

Like a broken record, I again must speak out against the imposition of short-term renewals against WSEE and KTTU for their apparent violation of the limitations on commercials in children's programming. However, unlike phonograph records, which have gone the way of the dinosaur, my position is based on a panoramic view of the future of telecommunications, and broadcasters' place in that future.

Preliminarily, I wish to emphasize that I do not think that the violations in these cases should be overlooked. Indeed, I feel that a forfeiture is clearly warranted in both cases. (Although I have made clear on many occasions that I am uncomfortable with large forfeitures, I will save this argument for another case.) I take very seriously the Commission's obligation to enforce the quantitative commercial limits explicitly set forth by Congress in the Children's Television Act, and believe that this Agency should aggressively enforce these limits.

However, the severe sanction of a short-term renewal should only be imposed in the most egregious cases involving second or third findings of liability for violations of the commercial limits. I am extremely concerned that the Commission in recent years has begun handing out short-term renewals like clowns handing out candy at the circus. My opposition to imposing short-term renewals in cases involving a first offense is based on four key concerns.

First, broadcasters must be in a position to compete in the increasingly competitive multichannel video world. If we continue to impose short-term renewals that place a cloud over the licensee and its ability to compete in an open marketplace (for example, in buying and selling stations, securing capital for upgrading their facilities to high definition television, etc.), we are tying the hands of broadcasters vis-a-vis their powerful multichannel cable, wireless cable, and DBS competitors.

Second, in a world of regulatory cracks, the specter of renewal challenges filed solely for the purpose of extracting some payment from a licensee looms large on the horizon. Short-term renewals only fuel the possibility that such baseless challenges will be filed. Even if a petition to deny or competing application is ultimately dismissed, the licensee has nonetheless been forced to expend significant sums of money to defend against a challenge which is without merit.

Third, the imposition of a short-term renewal is particularly unpalatable in a narrowly-focused system of sanctions in which we all but ignore other factors that, while not directly relevant to the violation or time period at issue, nonetheless are of paramount importance to the public interest considerations that are the touchstone of the Commission's work. Such factors include, for example, how long the regulation at issue has been in place, the steps the licensee has taken to resolve the problem which resulted in the imposition of a forfeiture; the licensee's overall record of compliance with our rules; and the licensee's efforts to serve the community.

Fourth, I am at a loss to see how the Commission can impose a short-term renewal where the violation at issue was unintentional and inadvertent. The licensee made a mistake, not a deliberate misstep, and should suffer a reasoned consequence. The consequence should match the seriousness of the violation. While a forfeiture is a logical sanction for an inadvertent, first-time violation because the licensee submits a one-time payment for its mistake, a short-term renewal causes the licensee to unfairly pay for its error well into the future. This punitive, long-term sanction is imposed regardless of whether the licensee's operating record and service to the public are otherwise laudable.

The imposition of a short-term renewal is particularly egregious in the case of KTTU-TV. The NAL issued today is part of the very first group of cases involving NAL's for violations of the commercial limits, which became effective just over three years ago. The licensee, upon learning of the commercial overages at the station, took immediate and dramatic steps to correct the problem, including replacing the general manager of KTTU and establishing a detailed, multi-layer procedure for preventing future overages on the station.

Finally, and perhaps most ironic given the primary thrust of the Children's Television Act, KTTU has done an outstanding job of airing educational and informational children's television programming. During the period in which the overages occurred, KTTU was airing approximately five and a half hours of children's programming on weekdays and four hours on weekends (with the weekday hours decreasing to about two and a half hours in late September). Since that time, KTTU has added four half-hour educational and informational programs to its weekend children's lineup (including Scramble and Pick Your Brain, both quiz shows for children, Scratch, a magazine format program for children, and Energy Express, a physical fitness, health and sports program for children); a one-half hour program aired Monday through Friday (Children's Room, produced by the Christian Science Monitor in which books are read to children); and has plans for adding new and expanding existing educational and informational programming.

A great man once said "Let he who is without sin cast the first stone." This Agency, like the licensees it serves, is not without sin. I can only hope that, especially with respect to inadvertent violations of our rules that do not involve safety of life or property, we move toward a more fair-minded approach to enforcement that takes into account the marketplace, the licensee, and the circumstances.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: April 5, 1995

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Northstar Television of Erie, Inc. 1800E
Licensee, WSEE-TV
1220 Peach Street
Erie, Pennsylvania 16501

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of one hundred thousand dollars ($100,000) pursuant to § 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming. In addition, WSEE-TV will be subject to reporting conditions and will have its license renewed for a two-year term.

In response to the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, the Commission adopted rules and policies limiting the amount of commercial time which may be aired during children's programming to 10.5 minutes per clock hour on weekends and 12 minutes per clock hour on weekdays. 47 C.F.R. § 73.670. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (program-length commercial). Finally, the Commission stated that it would consider in its review of television station license renewals the extent to which the licensee had complied with these commercial limits. *Children's Television Programming*, 6 FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991). The commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529 (1991).

On March 28, 1994, you filed an application for renewal of license for WSEE-TV, Erie, Pennsylvania (BRCT-940328KF). You also filed a supplement to FCC Form 303-S which contains questions to determine whether the licensee has complied with the limits on commercial matter as set forth in 47 C.F.R. § 73.670. In this supplement, you indicated that WSEE-TV had failed to comply with the limitations on commercial matter during children's programming during your last license term.

Specifically, in Exhibit 2 to WSEE-TV's renewal application, you indicated that WSEE-TV exceeded the limitations on commercial matter during children's programming on 204 occasions during its last license term. Of these commercial overages: four were four minutes and 30 seconds to five minutes and 30 seconds in length; seven were three minutes to three minutes and 30 seconds in length; 56 were two minutes to two minutes and 45 seconds in length; 56 were one minute to one minute and 50 seconds in length; 48 were less than one minute in length; and 33 involved program-length commercials.

You indicated that prior to the effective date for the Commission's commercial limitations, your General Manager directed that excess commercial spots in syndicated programming for children be replaced with PSAs, promotions, editorials and other non-commercial matter. You claim that although the station believed that it was in compliance with the commercial limits, it failed to review its program logs at the end of the first quarter in 1992. You state that a review of program logs at the end of the second quarter in 1992 revealed that the station's traffic computer had been preempting the PSAs and promos and replacing them with commercial matter.

During most of the third quarter of 1992, you claim that you were in compliance with the commercial limits. However, you indicate that a review in December 1992 revealed that commercial overages during children's programming on WSEE-TV had commenced again in mid-September. You state that the Traffic Manager was subsequently fired for, among other things, failing to adhere to the commercial limits during children's programming. However, when you hired a new Traffic Manager, you admit that you failed to clearly explain the requirement to limit commercials during children's programming. Thus, the commercial overages continued through September 1993 when further changes to the station's commercial preemption procedures were made.

You also claim that one contributing factor to your failure to comply with the commercial limits was the manner in which Hasbro Canada ordered commercial time on the station. You indicate that advance orders for commercial time from this company did not specify the particular products to be advertised. Details about the commercials, you claim, were not delivered to the station until the day before the spots were to air. Moreover, you indicate that the commercials preempted the non-commercial matter previously scheduled during children's programming. These preemptions resulted in the numerous commercial overages and program-length commercials which occurred on WSEE-TV. You state that when you finally asked Hasbro to modify its procedures it ceased advertising on WSEE-TV.

Finally, you claim that many of the commercial overages occurred during children's programming aired in the 6:00 to 7:00 AM time period. You further claim that WSEE-TV has virtually no audience at that time of day. Therefore, you contend that children were not actually harmed by the excess commercial matter.

WSEE-TV's record of exceeding the Commission's limits on commercial matter during children's programming on 204 occasions, including 33 significant program-length commercials, constitutes a willful and repeated rule violation. Accordingly, pursuant to § 503(b) of the Communications Act, Northstar Television of Erie, Inc., is hereby advised of its apparent liability for a forfeiture in the amount of one hundred thousand dollars ($100,000) for its apparent willful and repeated violation of 47 C.F.R. § 73.670. The amount specified was reached after consideration of the factors set forth in § 503(b)(2) of the Communications Act, and in particular, the following criteria: (1) the number of instances of commercial overages; (2) the length of each such overage; (3) the period of time over which such overages occurred; (4) whether or not the licensee established an effective program to ensure compli-

ance; and (5) the specific reasons that the licensee gives for the overages. These criteria were considered by the Commission in earlier cases when determining the appropriate forfeiture amounts for violations of the commercial limits during children's programming. *See, e.g., Koplar Communications*, 8 FCC Rcd 7884 (1993); *Independent Communications, Inc.*, 8 FCC Rcd 7886 (1993); and *KXRM Partnership*, 8 FCC Rcd 7890 (1993).

A recent court decision set aside a *Policy Statement* that we have used since 1991 as a guideline for assessing forfeitures. *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993). In *United States Telephone Ass'n v. FCC*, No. 92-1321 (D.C. Cir. July 12, 1994), the court indicated that the *Policy Statement* must be subject to public comment to comply with the Administrative Procedure Act. The Commission will act on the court's Order in a separate proceeding. While the criteria considered in connection with commercial overages were developed in cases decided under the *Policy Statement*, they were not inherently tied to the *Policy Statement*. Without regard to the *Policy Statement*, we continue to believe that these criteria are appropriate in analyzing violations of the commercial limits during children's programming since they take into account, *inter alia*, "the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability," as required under Section 503(b)(2)(1) of the Communications Act, as required.

The 204 occasions on which WSEE-TV exceeded the hourly limits on commercial matter during children's programming is a very high number of violations. Moreover, 123 of the overages were one minute or more in length and 33 other violations involved program-length commercials. Overages of this magnitude and duration mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it adopted the Children's Television Act of 1990. *Children's Television Programming*, 6 FCC Rcd at 2117-18. Moreover, the fact that these particular shows received low ratings does not negate the fact that significant amounts of excess commercial matter were aired in programs intended for children. The number and duration of the overages by WSEE-TV are among the most egregious violations the Commission has considered. For instance, in *Paramount Stations of Houston, Inc.*, 9 FCC Rcd 140 (1993), the licensee exceeded the commercial limits on 132 occasions of which 19 were one minute or more in length and 73 were program-length commercials. The fine assessed in that case was $80,000. WSEE-TV, however, had a substantially larger number of overall overages as well as a significantly greater number of overages that exceeded one minute in length. Moreover, while there were a greater number of program-length commercial infractions in *Paramount*, there are substantial program length commercial violations here as well. The length and repeated nature of the overages on WSEE-TV and the period of time during which such overages occurred constitute egregious misconduct. Further, the large number of commercial overages constitutes aggravated repetition of the violation. Consideration of these factors warrants a substantial forfeiture amount.

Additionally, it appears that you did not take effective actions to preclude commercial overages during children's programming on WSEE-TV until September 1993, 21 months after the commercial limits went into effect. While you claim to have taken actions to limit commercial overages in June 1992, such actions were not effective. Moreover, you did not establish procedures to monitor compliance. Thus, the commercial violations continued for 21 months, including 15 months after you first identified a problem with compliance at WSEE-TV. In other cases licensees have often discovered their own commercial overages and taken corrective action to preclude future overages. For instance, in *Koplar Communications, supra*, 193 out of the 197 overages occurred during the first four months that the commercial limits went into effect and before corrective action was taken. Similarly, in *Independent Communications, Inc., supra*, 108 of the 121 commercial overages occurred in the first six months after the commercial limits went into effect and before the licensee discovered the overages and made changes to its compliance procedures. However, at WSEE-TV 163 of the commercial overages occurred after June 1992 when you claim that the station first became aware of the excess commercial problem. The lack of an effective monitoring program is additional egregious misconduct warranting a significant forfeiture amount.

There do not appear to be any mitigating factors warranting a reduction in the amount of the forfeiture. When the Commission delayed the effective date of 47 C.F.R. § 73.670 until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. WSEE-TV has not proffered any extraordinary transitional or other difficulties that prevented it from complying with the commercial limits during its license period. Instead, the violations appear to result from WSEE-TV's failure to communicate effectively to station staff the need for strict compliance with the commercial limits and its failure to monitor and review adequately the station's performance in this area.

Given the breadth of the violations in this case and the substantial failure of the licensee to establish monitoring and compliance procedures, we believe that additional remedial measures are warranted in order to ensure that Station WSEE-TV complies with our limitations on commercials during children's programming in the future. First, we will impose reporting conditions. During its next license term, WSEE-TV will be required to report to the Commission, on a quarterly basis, whether it has complied with our limits on commercial matter during children's programming. Moreover, any noncompliance will have to be described in detail. Second, your license will be renewed only for a term of two years. This will afford the Commission an opportunity to review your ability to comply with our commercial limits and to take whatever corrective actions, if any, that may be warranted at that time.

Notwithstanding the substantial nature of the violations at issue here and the severity with which we regard them, there is no suggestion that the licensee has acted in bad faith and we do not believe they reflect a deliberate disregard for Commission requirements. Accordingly, we do not believe that these violations are an impediment to grant of the application for renewal of license for Station WSEE-TV. Therefore, the license renewal application of Northstar Television of Erie, Inc., BRCT-940328KF, IS HEREBY GRANTED for a term to end April 1, 1997, subject to the condition that:

Station WSEE-TV shall submit to the Commission an original and one copy of the following information within thirty (30) days after the end of each calendar quarter:

(a) A statement certifying whether the licensee has complied with the limits on commercial matter as set forth in 47 C.F.R. § 73.670.

(b) A list of each segment of programming, 5 minutes or more in duration, designed for children 12 years old and under and broadcast during the license period which contained commercial matter in excess of the limits set forth in 47 C.F.R. § 73.670. For each such programming segment so listed, indicate the length of the segment, the amount of the commercial matter contained therein, and an explanation of why the limits were exceeded.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the release date of this document "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of § 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on March 10, 1995.

BY DIRECTION OF THE COMMISSION*

William F. Caton
Acting Secretary

*Commissioner Quello concurring and issuing a statement.

Attachments
cc: Theodore D. Kramer, Esquire

Concurring Statement of
Commissioner James H. Quello

WSEE-TV, Erie, PA, Notice of Apparent Liability
KTTU(TV), Tucson, AZ, Notice of Apparent Liability
Excess Commercials During Children's Programming

Like a broken record, I again must speak out against the imposition of short-term renewals against WSEE and KTTU for their apparent violation of the limitations on commercials in children's programming. However, unlike phonograph records, which have gone the way of the dinosaur, my position is based on a panoramic view of the future of telecommunications, and broadcasters' place in that future.

Preliminarily, I wish to emphasize that I do not think that the violations in these cases should be overlooked. Indeed, I feel that a forfeiture is clearly warranted in both cases. (Although I have made clear on many occasions that I am uncomfortable with large forfeitures, I will save this argument for another case.) I take very seriously the Commission's obligation to enforce the quantitative commercial limits explicitly set forth by Congress in the Children's Television Act, and believe that this Agency should aggressively enforce these limits.

However, the severe sanction of a short-term renewal should only be imposed in the most egregious cases involving second or third findings of liability for violations of the commercial limits. I am extremely concerned that the Commission in recent years has begun handing out short-term renewals like clowns handing out candy at the circus. My opposition to imposing short-term renewals in cases involving a first offense is based on four key concerns.

First, broadcasters must be in a position to compete in the increasingly competitive multichannel video world. If we continue to impose short-term renewals that place a cloud over the licensee and its ability to compete in an open marketplace (for example, in buying and selling stations, securing capital for upgrading their facilities to high definition television, etc.), we are tying the hands of broadcasters vis-a-vis their powerful multichannel cable, wireless cable, and DBS competitors.

Second, in a world of regulatory cracks, the specter of renewal challenges filed solely for the purpose of extracting some payment from a licensee looms large on the horizon. Short-term renewals only fuel the possibility that such baseless challenges will be filed. Even if a petition to deny or competing application is ultimately dismissed, the licensee has nonetheless been forced to expend significant sums of money to defend against a challenge which is without merit.

Third, the imposition of a short-term renewal is particularly unpalatable in a narrowly-focused system of sanctions in which we all but ignore other factors that, while not directly relevant to the violation or time period at issue, nonetheless are of paramount importance to the public interest considerations that are the touchstone of the Commission's work. Such factors include, for example, how long the regulation at issue has been in place, the steps the licensee has taken to resolve the problem which resulted in the imposition of a forfeiture; the licensee's overall record of compliance with our rules; and the licensee's efforts to serve the community.

Fourth, I am at a loss to see how the Commission can impose a short-term renewal where the violation at issue was unintentional and inadvertent. The licensee made a mistake, not a deliberate misstep, and should suffer a reasoned consequence. The consequence should match the seriousness of the violation. While a forfeiture is a logical sanction for an inadvertent, first-time violation because the licensee submits a one-time payment for its mistake, a short-term renewal causes the licensee to unfairly pay for its error well into the future. This punitive, long-term sanction is imposed regardless of whether the licensee's operating record and service to the public are otherwise laudable.

The imposition of a short-term renewal is particularly egregious in the case of KTTU-TV. The NAL issued today is part of the very first group of cases involving NAL's for violations of the commercial limits, which became effective just over three years ago. The licensee, upon learning of the commercial overages at the station, took immediate and dramatic steps to correct the problem, including replacing the general manager of KTTU and establishing a detailed, multi-layer procedure for preventing future overages on the station.

Finally, and perhaps most ironic given the primary thrust of the Children's Television Act, KTTU has done an outstanding job of airing educational and informational children's television programming. During the period in which the overages occurred, KTTU was airing approximately five and a half hours of children's programming on weekdays and four hours on weekends (with the weekday hours decreasing to about two and a half hours in late September). Since that time, KTTU has added four half-hour educational and informational programs to its weekend children's lineup (including Scramble and Pick Your Brain, both quiz shows for children, Scratch, a magazine format program for children, and Energy Express, a physical fitness, health and sports program for children); a one-half hour program aired Monday through Friday (Children's Room, produced by the Christian Science Monitor in which books are read to children); and has plans for adding new and expanding existing educational and informational programming.

A great man once said "Let he who is without sin cast the first stone." This Agency, like the licensees it serves, is not without sin. I can only hope that, especially with respect to inadvertent violations of our rules that do not involve safety of life or property, we move toward a more fair-minded approach to enforcement that takes into account the marketplace, the licensee, and the circumstances.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

U.S. ELECTRODYNAMICS, INC.

Application for
authority to acquire
and operate satellite
and connecting facilities for
service to various overseas
points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 28, 1995; Released: April 5, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED, that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-025 IS GRANTED, and U.S. Electrodynamics, Inc. (USEI) is authorized to:

a. establish channels of communication between its Massachusetts and St. Croix earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

b. lease from Comsat and operate the satellite circuits specified in the Appendix hereto, between its Massachusetts and St. Croix earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in the Appendix hereto, furnished by its correspondents;

c. lease and operate necessary domestic connecting facilities;

d. lease a one-half interest in and operate necessary overseas connecting facilities; and

e. use the facilities in b, c, and d, above to provide USEI's regularly authorized services, including switched voice and data and private line services, between the United States and the points listed in the Appendix hereto.

3. IT IS FURTHER ORDERED that neither USEI nor any persons or companies directly or indirectly controlling or controlled by USEI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which USEI or any persons or companies controlling or controlled by USEI are parties.

4. IT IS FURTHER ORDERED that our authorization of USEI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendix -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendix or which originate in one of the countries listed in the Appendix and terminate in the United States. In addition, USEI may not -- and USEI's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched basic services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

APPENDIX
Numbers indicate 64-kbps circuits via INTELSAT

EUROPE

Albania-5
Austria-10
Belgium-20
Cyprus-5
Czech Rep.-5
Denmark-20
Finland-10
France-30
Germany-50
Greece-5
Hungary-10
Iceland-5
Ireland-10
Italy-25
Luxembourg-2
Netherlands-5
Norway-25
Poland-5
Portugal-2
Romania-2
Serbia-Montenegro-5
Spain-15
Sweden-5
Switzerland-5
TFYR of Macedonia-2
United Kingdom-30

C.I.S.

Armenia-5
Azerbaijan-5
Belarus-5
Kazakhstan-5
Latvia-5
Lithuania-5
Moldova-5
Russia-50
Turkmenistan-5
Ukraine-10
Uzbekistan-5

MID AND FAR EAST

Bahrain-2
Diego Garcia-2
India-5
Iran-5
Iraq-2
Israel-5
Jordan-2
Kuwait-5
Lebanon-2
Oman-2
Pakistan-5
Saudi Arabia-5
Qatar-2
Syria-3
Turkey-5
UAE-5
Yemen-2

AFRICA

Algeria-2
Angola-2
Benin-2
Botswana-5
Burkina Faso-5
Burundi-5
Cameroon-5
Cape Verde-5
Central Af. Rep.-5
Chad-5
Congo-5
Cote d'Ivoire-5
Djibouti-5
Egypt-5
Equat. Guinea-5
Eritrea-5
Ethiopia-5
Gabon-5
Gambia-5
Ghana-5
Gibraltar-1
Guinea-1
Guinea Bissau-1
Kenya-5
Lesotho-1
Liberia-2
Libya-1
Madagascar-1
Malawi-1
Mali-1
Malta-2
Mauritania-1
Mauritius-1
Morocco-3
Mozambique-2
Namibia-1
Niger-1
Nigeria-1
Rwanda-2
Sao Tome-2
Senegal-1
Sierra Leone-1
Somalia-1
South Africa-15
Sudan-2
Swaziland-2
Tanzania-1
Togo-1
Tunisia-1
Uganda-1
Zaire-3
Zambia-2
Zimbabwe-1

CARIBBEAN

Antigua-2
Aruba-1
Ascension-2
Bahamas-2
Barbados-2
Bermuda-4
Cayman Is.-2
Dominican Rep.-4
Falkland Is.-2
Haiti-5
Jamaica-5
Martinique-2
Neth. Antilles-3
St. Lucia-1
Trinidad-1
Turks & Caicos-2

CENTRAL AMERICA

Belize-2
Costa Rica-2
El Salvador-2
Guatemala-2
Honduras-2
Mexico-5
Nicaragua-5
Panama-10

SOUTH AMERICA

Argentina-10
Bolivia-5
Brazil-25
Chile-30
Colombia-20
Ecuador-20
French Guiana-5
Guyana-2
Paraguay-5
Peru-10
Suriname-4
Uruguay-3
Venezuela-10

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BPG INTERNATIONAL, INC.

Application for authority to operate as an international resale carrier. File No. I-T-C-95-133

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 28, 1995; Released: April 5, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-133 is GRANTED, and BPG International, Inc. (BPG) is authorized to provide international switched services by the resale of the international switched voice services set forth in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1, Sprint's Tariffs FCC Nos. 1 and 2, and C&W's Tariff FCC No. 3 between the United States and the overseas points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating arrangements in each of the countries to which it provides service and shall file with the Commission any operating agreements with its correspondents within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file tariffs pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization shall be construed to include authorization for the transmission of money in connection with the services the applicant seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order shall be construed as containing authority for the transmission of money.

7. IT IS FURTHER ORDERED that if BPG intends to provide international call-back services through the use of uncompleted call signaling, its authorization to resell international switched voice and/or data services to provide these services is without prejudice to, and is expressly subject to, any future action the Commission may take in *VIA USA Ltd., et al.*, 9 FCC 2288(1994), petition for reconsideration pending.

8. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SPRINT COMMUNICATIONS COMPANY L.P. File No. I-T-C-95-142

Application for authority to acquire and operate facilities for service between the United States and Iran and Qatar.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 28, 1995; Released: April 5, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the United States on the one hand, and Iran and Qatar, on the other hand, by Sprint Communications Company L.P. (Sprint).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-142 IS GRANTED and Sprint is authorized to:

a. lease from Comsat and operate one 2.048 Mbps satellite circuit between the Beeline, Florida earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Iran, furnished by Sprint's correspondent;

b. own and operate facilities in the Beeline earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate connecting facilities between the Beeline earth station and Sprint's New York operating center;

d. use the facilities in a, b, and c, above, to provide Sprint's regularly authorized services between the United States and Iran;

e. lease from Comsat and operate one 1.024 Mbps satellite circuit between the Beeline, Florida earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an earth station in Qatar, furnished by Sprint's correspondent;

f. own and operate facilities in the Beeline earth station, to be used in conjunction with the space segment capacity;

g. own and operate connecting facilities between the Beeline earth station and Sprint's New York operating center; and

h. use the facilities in e, f, and g, above, to provide Sprint's regularly authorized services between the United States and Qatar.

3. IT IS FURTHER ORDERED that our authorization of Sprint to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Iran or Qatar -- that is, private lines which originate in the United States and terminate in Iran or Qatar or which originate in Iran or Qatar and terminate in the United States. In addition, Sprint may not -- and Sprint's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Iran or Qatar end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that Iran or Qatar affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling or controlled by Sprint, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell, Chief
Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T CORP. File No. I-T-C-95-180

Application for authority
to convey capacity in the
TCS-1 Cable System.

ORDER AND AUTHORIZATION

Adopted: March 28, 1995; Released: April 5, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-180 IS GRANTED, and AT&T Corp. (AT&T) is authorized to convey to Compania Dominicana de Telefonos, C. por A. on an Indefeasible Right of User basis whole interests in 5 MAUOs[1] in the TCS-1 Cable System between Puerto Rico and the Dominican Republic.

3. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] A Minimum Assignable Unit of Ownership (MAUO) is a 64-kbps circuit equivalent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMSC Subsidiary Corporation	File Nos.29-DSS-MP-94 49-DSS-AMEND-94

Application for Modification of Construction Permit and License for the AMSC-1 Satellite

ORDER AND AUTHORIZATION

Adopted: March 29, 1995; Released: April 5, 1995

By the Chief, Satellite and Radiocommunication Division:

1. AMSC Subsidiary Corporation (AMSC) has applied to modify the milestone dates for its AMSC-1 satellite.[1] No comments were filed on this application. For the reasons discussed below, AMSC's application, as modified, is granted.

2. AMSC was authorized to construct, launch and operate its AMSC-1 satellite in 1989.[2] The authorization was modified in May 1993.[3] AMSC's current milestone schedule for this satellite is:

	Construction Completion	Launch
AMSC-1	April 1994	December 1994

3. AMSC seeks an extension of time in which to complete construction and launch of its AMSC-1 satellite. AMSC asserts that this extension is necessary because unanticipated technical problems with the satellite's L-band antenna. Resolution of the problems is being hindered by a contractual dispute between the vendor and the manufacturer. Although alternatives are being explored, Hughes Aircraft Company, the prime contractor for construction of AMSC-1, indicated that the construction would be delayed a minimum of five months. In turn, the launch was rescheduled for mid-April 1995, to account for the delay in construction and weather delays at the launch site. Therefore, AMSC requests extensions of the authorized milestone dates.

4. Generally, extensions of implementation milestone dates are granted when the delay in implementation is due to circumstances beyond the control of the licensee. The circumstances presented by AMSC are consistent with this policy. AMSC has already commenced construction of the AMSC-1 satellite, construction is continuing, and the requested extensions are brief. Grant of this extension would serve the public interest.

5. Accordingly, pursuant to Section 0.261 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.261, IT IS ORDERED that Application File Nos. 29-DSS-MP-94 and 49-DSS-AMEND-94 ARE GRANTED and the milestone schedule as specified in AMSC Subsidiary Corporation, 8 FCC Rcd 4040 (1993), IS MODIFIED as follows:

	Construction Completion	Launch
AMSC-1	February 1995	April 1995

6. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Thomas S. Tycz
Chief, Satellite and Radiocommunication Division
International Bureau

[1] *See* Public Notice, Report No. DS-1447 (August 10, 1994).
[2] American Mobile Satellite Corporation, 4 FCC Rcd 6041 (1989).
[3] AMSC Subsidiary Corporation, 8 FCC Rcd 4040 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 5, 1995

NOTICE OF REQUESTED EX PARTE PRESENTATIONS IN CC DOCKET NO. 92-297

The Office of Plans and Policy is scheduling *ex parte* presentations relating to CC Docket No. 92-297 (In the Matter of Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service). Pursuant to the Note to Section 1.1204(b)(7) of the Commission's Rules, 47 C.F.R. § 1.1204(b)(7), any new written information as well as a summary of any new oral information elicited from these requested *ex parte* presentations shall be disclosed in the record of the above-referenced proceeding in accordance with Section 1.1206 of the Commission's Rules. *See* 47 C.F.R. § 1.1206. In addition, should any new information arise from such presentations that relates to the merits or outcome of the restricted adjudication proceeding involving applications at the 27.5 - 30.0 GHz (Ka-Band), *see* Public Notice "Common Carrier Bureau Announces Restricted Adjudicative Proceedings Regarding Applications at 27.5 - 30.0 GHz (Ka-Band)," 9 FCC Rcd 2081 (April 20, 1994) (or any other proceeding not otherwise exempt from the Commission's *ex parte* rules), a public notice shall be issued to indicate that copies of the presentation and/or materials relating to that particular proceeding will be made available for public inspection and will be included in the record of the proceeding. *See* Note to 47 C.F.R. § 1.1204(b)(7).

Should future *ex parte* presentations be requested by Commission staff relating to CC Docket No. 92-297, the same procedures will be followed. For further information, please contact Amy Lesch (202) 418-2030 or Susan Magnotti at (202) 634-1773.

By the Chief, Office of Plans and Policy.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

HOMBRES ENTERPRISES, INC.
Assignor

File No. BAL-940928EF

and

WITHERS BROADCASTING COMPANY OF TEXAS
Assignee

For Assignment of License
of KNAL(AM)
Victoria, Texas

MEMORANDUM OPINION AND ORDER

Adopted: March 24, 1995; Released: April 6, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned applications for consent to assign the license of KNAL(AM), Victoria, Texas from Hombres Enterprises, Inc. ("Hombres"), to Withers Broadcasting Company of Texas ("Withers"). Withers is the licensee of UHF television station KAVU(TV), an ABC affiliate, on Channel 25, Victoria, Texas. Because the Grade A contour of KAVU(TV) encompasses the entire community of Victoria, Texas, a grant of the assignment application would result in Withers owning attributable interests in a television station and an AM radio station in the same market in violation of 47 C.F.R. § 73.3555(c), the Commission's the one-to-a-market rule.[1] Withers thus requests a waiver of the rule in connection with the proposed assignment.[2]

2. In support of its waiver request, Withers relies on the Commission's decision generally to permit television-radio combinations which meet the "failed station" standard set forth in *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules* ("Second Report and Order"), 4 FCC Rcd 1741 (1989), *recon. denied in part and granted in part*, 4 FCC Rcd 6489 (1989).[3] Specifically, Withers states that Hombres was involved in a Chapter 7 bankruptcy proceeding and that KNAL(AM) has been silent for more than two years. However, the bankruptcy proceeding was concluded when the court issued an order permitting Hombres' creditor to foreclose on certain of the station's physical assets. In order to rejoin the license and the station's physical assets, Hombres has agreed to assign the KNAL(AM) license to Withers and the creditor has agreed to convey the stations' assets subject to the court order to Withers. The creditor will then receive the proceeds of the assets' sale.

3. In the *Second Report and Order*, the Commission set forth standards for reviewing requests for waivers of the "one-to-a-market" rule. Specifically, the Commission determined that it would look favorably on waiver requests which: (1) involve radio and television station combinations in the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed combination; or (2) involve a "failed" radio or television station that has not been operated for a substantial period of time (*e.g.*, four months); or is involved in a voluntary or involuntary bankruptcy proceeding. *See Second Report and Order*, 4 FCC Rcd at 1741. The Commission stated that it would consider other requests for waiver of the one-to-a-market rule on a more rigorous case-by-case basis. With regard to the "failed station" standard, the Commission found that the objectives of diversity and competition are better served by preserving the service provided by the "failed station," even if that involves joint ownership of that station and another local station. *Id.* at 1753. However, an applicant requesting waiver of the rule is first required to provide relevant documentation, *i.e.*, proof of the length of time that the station has been off the air, or proof that the station is involved in bankruptcy proceedings. Here, although the bankruptcy proceeding has been concluded, Commission records substantiate the claim that KNAL(AM) has been off the air, with Commission approval, for over two years. Consequently, Withers has presented evidence that demonstrates that this transaction meets the "failed station" standard. *See, e.g., WPRV-TV, Inc., Debtor*, 9 FCC Rcd 5296 (1994); *KEZB, Inc.*, 7 FCC Rcd 3209 (1992).

4. Additionally, the Commission has stated that "petitioners who submit petitions to deny might be able to rebut the ["failed station"] waiver request." *See Second Report and Order*, 4 FCC Rcd at 1752. However, we note that the petitions to deny initially filed against the assignment of KNAL(AM) to Withers, and which petitioners seek to withdraw herein, present unsupported allegations that Withers engaged in questionable business practices in past dealings with a Victoria FM station and in the negotiations for the acquisition of KNAL. Ms. Green also alleges that there is insufficient programming specifically for the Black community in Victoria. The allegations in the petitions are undocumented and speculative. Thus, the allegations are insufficient to present a substantial and material question

[1] Section 73.3555(c) of the Commission's Rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.47 C.F.R. § 73.3555(c)(1994).

[2] Petitions to deny the sale of the station to Withers were filed on August 22, 1994 by Dorothia Green, a resident of Victoria, and by John Joseph Tibiletti, licensee of KTXN-FM, Victoria, Texas. Both Ms. Greene and Mr. Tibiletti subsequently filed requests to withdraw those petitions. Ms. Greene, Mr. Tibiletti and the parties have submitted affidavits which state that no money or other consideration in excess of legitimate and prudent expenses has been or will be paid for the withdrawal of the petitions. The requests to withdraw the petitions comply with the provisions of 47 C.F.R. § 73.3588, and the petitions raise no substantial and material questions of fact that would disqualify Withers or otherwise require further inquiry. Thus the requests will be granted and the petitions dismissed herein.

[3] The "failed station" standard is set forth in Note 7 to the one-to-a-market rule. *See* 47 C.F.R. Sec. 73.3555 n.7.

of fact as to whether a grant of the requested waiver is inconsistent with the public interest or to otherwise present evidence sufficient to rebut Withers presumptive entitlement to a waiver.

5. Further, Withers pledges to return the station to operating condition in order to reinstitute full time service to Victoria, Texas. In this regard, Withers has presented a detailed timetable for returning the station to the air. Withers pledges to consummate the transaction, to make necessary repairs and to have additional equipment installed so that KNAL(AM) will be able to resume normal operations within 100 days of the approval of the assignment application.

6. Under these circumstances, and given that Withers is fully qualified in all other respects, we find that the public interest will be served by a waiver of the one-to-a-market rule under the failed station standard and grant of the application, subject to the following conditions. IT IS ORDERED, That, the request for waiver of the Commission's one-to-a-market rule, 47 C.F.R. Sec. 73.3555(c), IS HEREBY GRANTED, and the application for assignment of the license of KNAL(AM), Victoria, Texas, from Hombres Enterprises, Inc. to Withers Broadcasting Company of Texas, File No. BAL-940928EF, IS HEREBY GRANTED, subject to the conditions set forth in the ordering clauses.

7. IT IS ORDERED, That the assignment of the license of KNAL(AM) be consummated within sixty (60) days of the date of the grant, that the Commission be notified of such consummation within one day thereafter and that the station resume broadcasting within sixty (60) days after consummation of the grant of the application; and that ten (10) days prior to the commencement of regular programming operation, the assignee submit certification that equipment performance measurements were made in accordance with 47 C.F.R. § 73.1590.

8. IT IS FURTHER ORDERED, That, pursuant to 47 C.F.R. § 73.3588, the requests for withdrawal of the petitions to deny filed by Dorothia Green, and by John Joseph Tibiletti on November 17, 1994 ARE GRANTED and the petitions are HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of
Bridgeways Communications
Corporation Against Comcast Cablevision
of Danbury

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 1995; Released: April 6, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Pending in the captioned proceeding is a complaint filed by Bridgeways Communications Corporation, licensee of television station WHAI, Bridgeport, Connecticut, ("WHAI") against Comcast Cablevision of Danbury ("Comcast") seeking carriage on Comcast's cable television system serving Danbury, Connecticut and associated communities. Comcast has filed an opposition to this complaint.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992[1] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Cable systems with more than twelve usable activated channels may be required to carry the signals of local commercial television station only up to one-third of the aggregate number of usable activated channels on the system.[4]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

Section 614(h)(C)(iii) further provides that "A cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to |Section 614(h).|"[5]

ARGUMENTS OF THE PARTIES

4. WHAI, in its complaint, states that both it and the cable operator are located in the New York ADI. WHAI complains that despite agreeing to provide the operator with a sufficient signal and to indemnify it for any copyright liability, its signal is still not being carried. WHAI states that it duly sought carriage but the operator refused to honor the request because "the Danbury system has 40 channels, and our must-carry obligations have been met at 13 channels." According to WHAI, the operator maintains that it was meeting its must carry obligations by carrying stations from outside of the New York ADI. In addition, WHAI asserts that the operator promised to provide a channel line-up card, but to date, has not done so. WHAI argues that the operator's failure to provide the channel line-up card constituted a denial by the system to carry the station and that it has timely filed its complaint within 60 days of this denial. WHAI requests that the Commission declare that Comcast is required to carry its signal.

5. Comcast in opposition argues that it is currently carrying the requisite number of channels pursuant to the Commission's rules. Comcast states that the Danbury cable system has 40 activated channels and thus is required to carry 13 local commercial stations to fulfill its must carry obligations. The system carries eight local commercial stations from the New York ADI. In addition, Comcast states it is legally obligated to continue carrying five stations from Connecticut by virtue of various petitions that have been filed seeking to alter the ADI markets of the Connecticut stations.[6] Comcast relies on Section 76.59 (c) of the Commission's rules for support of the principle that a cable operator is not permitted to "delete from carriage the signal of a commercial television station during the pendency of any proceeding [to modify the station's market]."

6. Comcast also argues that it would not be expedient for it to carry WHAI's signal only to discontinue it again if the various petitions have been granted. Comcast additionally claims that it did provide WHAI with a channel line-up card and has made every attempt to cooperate with WHAI's request for channel line-up information.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 76.55(e) of the rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Section 614(b)(1)(b). In calculating the number of channels that represent one third of the system's usable activated channels, cable operators may round the result to the nearest whole number. *See* 8 FCC Rcd at 2972, n.78.

[5] *See also* 47 C.F.R. §76.59.

[6] Comcast asserts that it carries eight local commercial New York ADI stations and five local commercial Hartford-New Haven ADI stations. Comcast opposition at 5. This is not contested and is consistent with Comcast's most recent Form 325 filing with the Commission. Exhibit B of Comcast's filing, however, does not list WTXX as a station carried. Based on the other information available, the exhibit B listing appears to be erroneous. If that is not correct the accurate information should promptly be brought to the Commission's attention.

ANALYSIS AND DECISION

7. WHAI's has not established that Comcast Cablevision of Danbury has violated the mandatory broadcast signal carriage rules and its complaint must accordingly be denied.[7] WHAI is located in the same ADI as Comcast's Danbury system, has agreed to provide an adequate signal to the Danbury principal headend, and has agreed to indemnify Comcast for any additional copyright expenses incurred. WHAI is thus eligible to exercise mandatory signal carriage rights with respect to the Danbury system. Nevertheless, according to undisputed evidence in this proceeding, the system in question is carrying enough local commercial stations to satisfy its signal carriage requirement under the requirements of Section 614 of the Communications Act. Under Section 614, cable operators with more than twelve usable activated channels must devote up to one-third of this capacity to the carriage of local commercial television stations.[8] In this case, Comcast is only required to carry 13 local commercial television stations and is already doing so. Thus, it is not required at this time to carry any additional must carry signals, including WHAI's.

8. Comcast's count of channels required to be carried under the rules includes eight signals from the New York market and five Hartford-New Haven ADI stations that are the subject of pending market modification requests or that are now subject to carriage as the consequence of market modification requests that have previously been acted on. Danbury is within the market area of WTNH, New Haven, as a consequence of the decision in *Cook Inlet Communications, Inc.*, (CSR-3827-A), DA 95-541 (released March 24, 1995). WTXX, channel 20, Waterbury, Connecticut is not subject to deletion as a consequence of the pendency of the proceeding in CSR-3839, commenced by Counterpoint Communications, Inc., the licensee of WTXX. WTIC, Hartford, is not subject to deletion as a consequence of the pendency of the proceeding in CSR-4047, commenced by 61 Licensee, Inc., the licensee of WTIC. WVIT, New Britain, Connecticut and WFSB, Hartford, (as well as WTNH, WTXX, and WTIC) are the subject of similar proceedings in CSR-3885 and CSR-3989 commenced by the Attorney General of the State of Connecticut and the State of Connecticut Department of Public Utility Control. Although disputes are pending regarding the standing of the governmental entities involved to file the referenced petitions, given the status of these filings and the requirement that the cable operator is not permitted to delete a commercial television station signal during the pendency of a market modification proceeding, it cannot be concluded that Comcast Cablevision of Danbury is in violation of the mandatory broadcast signal carriage rules at this time. Upon resolution of these proceedings, WHAI may reassert its carriage rights as may be appropriate at that time.

ORDER

9. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.61 of the Commission's Rules (47 C.F.R. §76.61), that the complaint filed on January 24, 1994 by Bridgeways Communications Corporation IS DENIED.

10. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[7] We cannot conclude that a different result is warranted based on WHAI's claimed failure to receive the requested channel line up list from Comcast. Comcast denies that the requested information was not provided and it has since be made available separately. Its absence does not change the substantive result herein which is dictated by Section 614 of the Communications Act.

[8] *See* 47 C.F.R §76.56(b)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Authority to
Issue Subpoenas

ORDER

Adopted: March 14, 1995; Released: April 6, 1995

By the Commission:

1. Section 409(e) of the Communications Act of 1934 (Act), as amended, 47 U.S.C. § 409(e), grants the Commission express authority to issue subpoenas to require, among other things, the production of information relating to any matter under investigation. In this connection, the courts have held that the Commission may issue subpoenas to, among others, private entities not subject to the agency's jurisdiction.[1]

2. Section 5(c)(1) of the Act, 47 U.S.C. § 155(c)(1), affords the Commission authority to delegate the subpoena power conferred by Section 409(e). In accordance with Section 5(c)(1), we previously delegated to the Chief, Compliance and Information Bureau (formerly the Field Operations Bureau) authority to issue administrative subpoenas in connection with investigation of cases involving violations of Sections 301 (unlicensed operation) or 302(a)(illegal marketing of radio frequency devices capable of causing harmful interference) of the Act.[2] *See* 47 U.S.C. §§ 301 and 302(a). We believe that the mission and proper functioning of the Compliance and Information Bureau will be enhanced by a broader delegation of our subpoena authority to that Bureau.

3. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C § 155(c)(1), authority is delegated to the Chief, Compliance and Information Bureau, to require by administrative subpoena the attendance and testimony of witnesses and the production of books, papers, correspondence, and any other records relating to any matter under investigation.

4. IT IS FURTHER ORDERED that Section 0.311(f) of the Commission's rules, 47 C.F.R. § 0.311(f), is amended to reflect the foregoing delegation of authority to the Chief, Compliance and Information Bureau. This amendment to the Commission's rules is contained in Appendix A of this Order. The requirements set forth in 5 U.S.C. § 553(b) pertaining to notice and comment and effective date in rule making proceedings do not apply to this amendment because it concerns matters of agency organization, procedure, or practice. *See* 5 U.S.C § § 553(b)(A), 553(d).

5. IT IS FURTHER ORDERED THAT this amendment of Section 0.311(f) as set forth in the Appendix is EFFECTIVE upon the date of publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Title 47 of the Code of Federal Regulations, Part 0, is amended as follows:

Part 0

1. Authority for part 0 of Title 47 of the Code of Federal Regulations continues to read as follows:

Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155

2. Section 0.311(f) is amended to read as follows:

Compliance and Information Bureau

§ 0.311 Authority Delegated

* * * * *

(f) The Chief of the Compliance and Information Bureau is authorized to issue subpoenas for the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records relating to investigations under authority of the Communications Act of 1934, as amended.

[1] *See* FCC v. Cohn, 154 F. Supp. 899 (S.D.N.Y. 1957).

[2] *See* Authority to Issue Subpoenas, 8 FCC Rcd 8763 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTEX TELECOMMUNICATIONS, INC. File No. I-T-C-95-114

Application for authority to acquire and operate facilities for service between the United States and Honduras.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 29, 1995; Released: April 6, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-114 IS GRANTED, and INTEX Telecommunications, Inc. (ITI)[1] is authorized to:

a. lease from Comsat and operate 45 64-kbps voice-grade satellite circuits between an appropriately licensed U.S. earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Honduras, furnished by ITI's correspondent;

b. lease and operate facilities in the U.S. earth station, to be used in conjunction with the space segment capacity;

c. lease and operate necessary domestic connecting facilities;

d. multiply the number of bearer channels authorized herein in order to derive the maximum number of circuits; and

e. use said facilities to provide regularly authorized services, including switched voice and data and private line services, between the United States and Honduras.

3. IT IS FURTHER ORDERED that our authorization of ITI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Honduras -- that is, private lines which originate in the United States and terminate in Honduras or which originate in Honduras and terminate in the United States. In addition, ITI may not -- and ITI's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Honduras end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that Honduras affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither ITI nor any persons or companies directly or indirectly controlling or controlled by ITI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which ITI or any persons or companies controlling or controlled by ITI are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

[1] This application was originally filed by Corporate Telemanagement Group (CTG). CTG amended its application on February 23, 1995 to specify its wholly-owned subsidiary, ITI, as the applicant.

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL TELECOMMUNICATIONS EUROPE, LTD. — File No. I-T-C-95-089

Application for authority to resell the switched and private line services of other common carriers.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 31, 1995; Released: April 6, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-089 IS GRANTED, and International Telecommunications Europe, Ltd. (Intelco Europe) is authorized to:

a. provide international switched services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, Sprint's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1, Allnet's Tariff FCC No. 1, International Telecomm. Corp.'s Tariff FCC No. 1 and WilTel's Tariff FCC No. 2 between the United States and the overseas points listed in those tariffs.

b. lease from AT&T and operate 24 64-kbps voice-grade circuits each to France, Germany, Israel and Sweden, for provision of private line service, not interconnected with the public switched network, between the United States and those points;

c. lease from AT&T and operate 72 64-kbps voice-grade circuits to the United Kingdom and 24 64-kbps voice-grade circuits to Canada for provision of private line services both interconnected and noninterconnected with the public switched network between the United States and those points; and

d. lease and operate any necessary domestic connecting facilities between AT&T's operating office and the operating office of Intelco Europe.

3. IT IS FURTHER ORDERED that our authorization of Intelco Europe to provide private lines to France, Germany, Sweden or Israel as part of its authorized services is limited to the provision of such private lines only between the United States and those points -- that is, private lines which originate in the United States and terminate in France, Germany, Sweden or Israel or which originate in France, Germany, Sweden or Israel and terminate in the United States. In addition, Intelco Europe may not -- and Intelco Europe's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or France, Germany, Sweden or Israel end, or both, for the provision of international basic switched services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED our authorization of Intelco Europe to resell international private lines for the provision of switched services between the United States and Canada or the United Kingdom is limited to the provision of switched services between the United States and Canada or the United Kingdom -- that is, private lines which carry traffic that originates in the United States and terminates in Canada or the United Kingdom, or traffic that originates in Canada or the United Kingdom and terminates in the United States.

5. IT IS FURTHER ORDERED that our authorization to resell international private lines for the provision of switched services and interconnected private line services between the United States and Canada and/or the United Kingdom is conditioned on Canada and/or the United Kingdom continuing to afford resale opportunities equivalent to those available under United States law. In addition, Intelco Europe is required to file with the Commission, on a semi-annual basis, the information contained in the annual traffic reports required by Section 43.61 of the Commission's Rules. This reporting requirement applies to traffic carried through December 1995 for Canada, and December 1997 for the United Kingdom. See fONOROLA/EMI, *See fONOROLA/EMI, Order on Reconsideration*, 9 FCC Rcd 4066, 4070 (1994); *ACC Global Corp.*, FCC 94-236, para. 51 (released October 6, 1994). These semi-annual reports shall be filed with the Commission not later than September 30 for the first six-month calendar period, and March 31 for the second six-month calendar period.

6. IT IS FURTHER ORDERED that neither Intelco Europe nor any persons or companies directly or indirectly controlling or controlled by Intelco Europe, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Intelco Europe or any persons or companies controlling or controlled by Intelco Europe are parties.

7. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that for its resold switched and noninterconected private line services, the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

10. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b), for the common carrier facilities authorized herein.

11. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US Sprint Communications
Company, L.P.,

Complainant and
Counterclaim Defendant,

v.

AT&T Corp., File Nos. E-90-113,
E-90-113C and
Defendant and Counterclaimant. E-91-63

ORDER

Adopted: March 31, 1995; Released: April 7, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On February 8, 1990, Sprint Communications Company, L.P. (Sprint) (successor in interest to US Sprint Communications Company, L.P.) filed a formal complaint (File No. E-90-113) against AT&T Corp. (AT&T) with the Commission pursuant to Section 208 of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 208. In the complaint, Sprint alleged that certain AT&T tariff filings were unlawful. On March 19, 1990, AT&T filed an answer to Sprint's complaint and a counterclaim (File No. E-90-113C) alleging that Sprint was providing service on an untariffed basis in violation of Section 203 of the Act, 47 U.S.C. § 203. Sprint filed its answer to AT&T's counterclaim on April 10, 1990.

2. On February 19, 1991, Sprint filed a second complaint (File No. E-91-63) alleging that certain other AT&T offerings were unlawful. AT&T filed its answer to this complaint on April 11, 1991, accompanied by a counterclaim alleging Sprint violated Sections 202 and 203 of the Act, 47 U.S.C. §§ 202, 203.

3. Sprint and AT&T have now filed a joint motion requesting permission to withdraw the complaints and counterclaims with prejudice, stating that they have settled their disputes and that termination of the proceedings will not affect any other party.

4. We are satisfied that granting the parties' motion will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

5. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 154(j), 208, and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' joint motion IS GRANTED WITH PREJUDICE and that the above-captioned complaint proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. 55-DSS-ML-94

Application for Modification of the Telstar 302 Domestic Fixed Satellite License

and

Application for Special Temporary Authority for the Telstar 302 Domestic Fixed-Satellite — File No. 56-DSS-STA-94

ORDER

Adopted: March 31, 1995; Released: April 7, 1995

By the Chief, Satellite and Radiocommunication Division:

1. American Telephone and Telegraph Company (AT&T) has filed an application for authority to operate its Telstar 302 satellite in an inclined orbit mode. In addition, AT&T has requested a six month extension of the satellite's operating authority. The request is unopposed. For the reasons set forth below, we grant AT&T's application.[1]

2. Telstar 302 is operating at the 85^0 W.L. orbit location. It was launched in August 1984 and commenced service in October 1984. Its on-board stationkeeping fuel is nearly depleted. In order to continue to provide service to customers, AT&T has requested an extension of Telstar 302's license term and authority to operate the satellite in an inclined orbit mode. AT&T states that continued operation of Telstar 302 would serve the public interest, especially in view of the launch failure of its Telstar 402 satellite. According to AT&T, operating in an inclined orbit mode would prolong Telstar 302's operational life until services can be transitioned to other satellites.

3. We permit AT&T to operate Telstar 302 in an inclined orbit mode, thus extending its operating life. In addition, we extend operating authority for the satellite until September 30, 1995. This should allow AT&T sufficient time to transition customers now receiving service from Telstar 302 to other satellites. Grant of this modification will provide an opportunity for the public to continue receiving services from Telstar 302. Therefore, we find that, pursuant to 47 U.S.C. § 309, grant of these applications will serve the public interest, convenience and necessity.

ORDERING CLAUSES

4. Accordingly, IT IS ORDERED that, pursuant to Section 0.261 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.261, Application File No. 55-DSS-ML-94 IS GRANTED and American Telephone and Telegraph Company IS AUTHORIZED to operate the Telstar 302 satellite in an inclined orbit mode.

5. IT IS FURTHER ORDERED that authority to operate the Telstar 302 satellite in an inclined orbit mode is subject to the following conditions:

(a) American Telephone and Telegraph Company shall periodically correct the satellite attitude to achieve a stationary spacecraft antenna pattern on the surface of the Earth and centered on the satellite's designated service area.

(b) American Telephone and Telegraph Company shall control all interference to adjacent satellites, as a result of operating in an inclined orbit, to levels not to exceed that which would be caused by the satellite network operating without an inclined orbit.

(c) American Telephone and Telegraph Company can not claim protection in excess of the protection that would be received by the satellite network operating without an inclined orbit.

(d) American Telephone and Telegraph Company shall continue to maintain the space station at the authorized longitude orbital location in the geostationary satellite arc with the appropriate east-west stationkeeping tolerance.

6. IT IS FURTHER ORDERED that American Telephone and Telegraph Company IS AUTHORIZED to operate its Telstar 302 satellite through September 30, 1995.

7. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Thomas S. Tycz
Chief, Satellite and Radiocommunication Division
International Bureau

[1] AT&T has been operating its Telstar 302 satellite pursuant to special temporary authority granted verbally in December 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 31, 1995

Released: April 7, 1995

IN REPLY REFER TO:
8210-RHW
94120133

Greater New Orleans Broadcasting Association
c/o Ashton R. Hardy, Esquire
Hardy & Carey
111 Veterans Boulevard
Suite 255
Metairie, Louisiana 70005

Dear Mr. Hardy:

This letter is in response to your request, dated December 14, 1994, for a declaratory ruling concerning the propriety of broadcasting advertisements promoting a "Gift-A-Day Giveaway" contest conducted by the Isle of Capri Casino (the "Casino") located in Biloxi, Mississippi, under the federal anti-lottery provisions set forth in 18 U.S.C. § 1304 *et seq.*, and Section 73.1211 of the Commission's Rules. You state that this declaratory ruling is requested on behalf of the Greater New Orleans Broadcasting Association ("GNOBA"), a trade association which represents 26 radio and television stations licensed to serve the greater New Orleans market.

You describe the promotion as follows. In order to participate in the contest, entrants must obtain either a free coupon from their local daily newspaper or a free card from a booth located at the entrance to the Casino. The Casino is located approximately 90 miles east of downtown New Orleans via Interstate Highway 10, and the member stations of the GNOBA seeking to broadcast advertisements for this contest are located at distances ranging from 40 to 90 miles from the Casino. The contest entrants must also obtain an "Island Gold Card," which is also available free of charge. In order to obtain the Island Gold Card, the entrant must present himself at the "Island Gold Card" booth at the entrance to the Casino and give his name and address to the booth attendant. Entrants must then present their Island Gold Card and the free coupon or card at the Gift-A-Day Giveaway booth, also located at the entrance to the Casino. The entrant then receives a Gift-A-Day game card. Once each day during the contest, an entrant may present his Gift-A-Day game card at the Gift-A-Day booth at the entrance to the Casino. The booth is open 10:00 am to 10:00 pm every day. A Casino employee will then scan the game card (thereby performing a drawing) and immediately inform the entrant whether he has won one of the prizes offered in connection with the contest.

According to your request, entrants are not required to purchase anything or participate in any activities at the Casino to enter, and all entrants are allowed only one chance a day to win a prize, whether they are Casino customers or do not even enter the Casino.[1]

As you are aware, the U.S. Code, 18 U.S.C. § 1304, and Section 73.1211(a) of the Commission's Rules prohibit the broadcasting of any advertisement or information concerning any lottery, with certain enumerated exceptions. A lottery contains the elements of chance, prize, and consideration. As your request recognizes, the elements of chance and prize appear to be present in the Gift-A-Day Giveaway. The central question here is whether the requirement that entrants must generally travel 40 to 90 miles in order to enter the contest constitutes consideration.

Section 73.1211(b) of the Commission's Rules states in relevant part that the element of consideration exists where winners "are required to furnish any money or other thing of value . . . ."[2] In *Public Notice Concerning Applicability of Lottery Statute to Contests and Sales Promotions*, 18 FCC 2d 52 (1969), the Commission recognized that certain prerequisites for entry in a contest, such as visiting the place of business of the promoter of a contest, would not ordinarily constitute consideration:

> Clearly, consideration is present when the contestant is required to pay money or give something of value for the chance to win a prize. Therefore, the promotional scheme must not require a purchase or the risking of money or other things of value. The mere acts of appearing, registering and securing free paraphernalia, standing alone, do not constitute sufficient consideration to support a finding of a lottery. See *Federal Communications Commission v. American Broadcasting Company, Inc.*, 347 U.S. 284 (1954);

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[1] In considering your Request for Declaratory Ruling, we have reviewed the sample advertising text you provided as Exhibit A only to the extent that it assisted us in understanding the material terms and conditions of the Gift-A-Day Giveaway. We have not considered whether the specific text you submitted is otherwise in compliance with the Commission's Rules, a task that could not in any event be performed without additional information regarding the contest. Such further information is not necessary, however, in addressing the principal issue presented by your request.

[2] Section 73.1211(b) states the following:

> (b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or other thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize, such winner or winners are required to furnish any money or other thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question. (See 21 FCC 2d 846).

> *Caples Co. v. United States*, 243 F.2d 232 (1957), and *Garden City Chamber of Commerce v. Wagner*, [100 F. Supp. 769 (E.D.N.Y. 1951)] .

18 FCC 2d at 52. In the present case, w e do not believe that the entrant who must travel a certain distance to appear at the promoter's place of business in order to enter the contest has provided any "money or thing of value," even if that travel takes up to an hour or two of the entrant's time. The decisions cited above found consideration to be lacking where a prospective participant, in order to enter the drawing, had to travel to the promoter's place of business within the station's service area. In the case of a Class C FM station or a full power television station, that local service area may extend 80 to 100 miles from one end to the other. No logical distinction can be drawn where the travel to the promoter's place of business is of a comparable time or distance but extends beyond the service area. It would be an anomalous result, for example, for the Commission to find consideration to exist where an entrant travels some distance beyond the service area, but no consideration to exist where another entrant travels a comparable or even greater distance within the service area.

In addition, while there may be some cost to the entrant to travel the described distance of 40 to 90 miles (in gasoline costs, or tolls, or bus fare, for example), we find it significant that such expenditures do not flow, directly or indirectly, to the promoter of the contest, the Casino in the present case. In *Greater Indianapolis Broadcasting Co., Inc.*, 44 FCC 2d 37 (1973), the Commission addressed the issue of consideration in an analogous context. In that case, in order to enter a contest drawing, participants had to play a round of 18 holes of golf at any local golf course, and then mail in the scorecard (signed by the course professional) to the station, which then conducted a drawing from submitted scorecards for prizes. The golf courses where entrants played were not involved in the promotion, and the station received no part of the greens fees paid by entrants to the golf courses where they played. The Commission found that the element of consideration was not present:

> We base this conclusion upon the absence of any indication that consideration substantial enough to support a finding that there was a lottery flowed, directly or indirectly, from the participants to the promoter. While it is clear that where the purchase of a product or service entitles the buyer to a chance at a prize there is adequate consideration, *Horner v. United States*, 147 U.S. 449, we know of no case interpreting the federal lottery statutes where a lottery was found to exist without the receipt of the consideration by the promoter. . . . If the participants' activity relied on in [FCC v. ABC and *Caples Co. v. U.S.*] was insufficiently substantial, it is, we believe, difficult to sustain the proposition that there is a lottery without any additional benefit to the promoter (here WXLW), even though the participants in the contest may make some payment to someone else in order to participate, as long as there is no indirect flow through of the payment to the promoter.

44 FCC 2d at 39-40 (footnote omitted).

In the present case, because any travel-related expenditures incurred by entrants appearing at the Casino do not flow to the Casino itself, the lottery element of consideration does not appear to exist. Additionally, the expenditure of time and effort by would-be entrants is not so substantial or excessive when compared to that required of entrants in other contests which the Commission has found not to be lotteries. For example, in the *Greater Indianapolis* case discussed above, entrants were required to spend four to six hours playing a round of golf, an expenditure of time and effort that does not differ quantitatively from that involved in driving to and from the Casino in the present case.

It could be suggested that the effort expended by entrants in traveling the distance to the Casino may indirectly inure to the benefit of the Casino because, after traveling that distance and entering the free contest at the Casino's door, the entrant may be inclined to spend a few hours at this particular Casino's gambling tables. However, we find such potential benefit to be too speculative and remote to constitute consideration under the criminal federal lottery statute. The entrant in the Gift-A-Day Giveaway is not required to spend any money or additional time at the sponsoring Casino, and there are many other activities available in the destination community of Biloxi. In this respect, the Gift-A-Day Giveaway discussed herein differs as well from other cases in which consideration was found to exist because, in addition to appearing at the promoter's place of business, an entrant was required to remain on the premises for an indeterminate period of time until "free" entries were distributed. *See, e.g., Letter to Rolla Cleaver, Esquire*, Mass Media Bureau, July 31, 1990 (free entries distributed randomly "throughout the day" to persons present in the casino whether gambling or not, held to constitute consideration: ". . . the Commission believes that the effort expended by a participant to be present throughout the day in the Palace Station hotel, casino and restaurant areas is a benefit to the promoter and constitutes consideration.").[3] Additionally, from the description of the contest you provided, there does not appear to be any advantage or additional chances afforded to entrants who become customers of the Casino; all entrants are limited to one entry per day, with no "bonus" chances afforded for customers. *Compare , WTMJ, Inc.*, 7 FCC Rcd 4957 (MMB 1992); *KLAS, Inc.*, 7 FCC Rcd 2923 (MMB 1992). For these reasons, we do not believe that consideration is present in the Gift-A-Day Giveaway.

[3] The Commission has stated that in order for a contest sponsor to rely on the provision of free entries to avoid a finding that consideration exists, "[n]onpurchasing contestants must be able to obtain chances in the same places, at the same times, and in the same number as purchasing contestants, *in a setting that does not otherwise encourage a purchase*." *Taft Broadcasting Co.*, 18 FCC 2d 186, 189 (1989) (emphasis added). In the present case, entrants are not required to spend any additional time at the Casino in order to enter the contest, and thus they are not subjected to a setting that otherwise encourages a purchase in the Casino.

The conclusions stated herein are based on our understanding of the contest as described by you. Should our understanding be incorrect, or the operation of the game differ from your description, our conclusions could be different.

We trust that the foregoing is responsive to your request.

Sincerely,

Norman Goldstein, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Kansas City Cable Partners d/b/a American Cablevision of Kansas City Kansas City, Missouri, et al. — CSR-4109-A

For Modification of the Kansas City, Missouri ADI

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1995; Released: April 7, 1995

By the Cable Services Bureau:

I. INTRODUCTION

1. In the captioned proceeding, Kansas City Cable Partners d/b/a American Cablevision of Kansas City ("American Cablevision") has requested modification of the Kansas City, Missouri Area of Dominant Influence (ADI) insofar as it involves carriage of the signal of television station KMCI(TV), Channel 38, Lawrence, Kansas. Specifically, American Cablevision requests that the 44 communities served by its cable systems described as being in Clay, Jackson, Platte and Cass Counties, Missouri and Wyandotte, Johnson and Leavenworth Counties, Kansas ("Kansas City systems") be excluded from KMCI(TV)'s television market, which are considered part of the Kansas City, Missouri ADI, for the purpose of the cable television mandatory broadcast signal carriage rules.[1] This petition was opposed by Miller Broadcasting Inc. ("Miller"), licensee of KMCI(TV) on November 12, 1993 and American Cablevision replied on November 30, 1993. Letters supporting the request were received from the City of North Kansas City, the City of Smithville, the City of Edwardsville, and the City of Parkville.

II. BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;

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[1] The communities involved are Kansas City, Missouri; North Kansas City, Missouri; Mission Woods, Kansas; Mission Hills, Kansas; Westwood Hills, Kansas; Liberty, Missouri; Houston Lake, Missouri; Riverside, Missouri; Avondale, Missouri; Northmoor, Missouri; Claycomo, Missouri; Pleasant Valley, Missouri; Glenaire, Missouri; Wyandotte County, Kansas; Kansas City, Kansas; Gladstone, Missouri; Smithville, Missouri; Village of Oaks, Missouri; Oakview, Missouri; Oakwood Park, Missouri; Parkville, Missouri; Platte County, Missouri; Lake Waukomis, Missouri; Weatherby Lake, Missouri; Kearney, Missouri; Bonner Springs, Kansas; Desoto, Kansas; Gardner, Kansas; Belton, Missouri; Grandview, Missouri; Lees Summit, Missouri; Edwardsville, Kansas, Leavenworth County, Kansas; Leavenworth, Kansas; Lansing, Kansas; Fort Leavenworth, Kansas; Platte City, Missouri; and Tracy, Missouri (collectively, "American Communities"). Although the text of its request initially references only Clay and Jackson Counties, Missouri and Wyandotte and Leavenworth Counties, Kansas, the caption of the document also references Platte and Cass Counties, Missouri and Johnson County, Kansas. Reference within the American Cablevision filings is also made to "Clayton" County, Missouri which appears to mean "Clay" County. Numerous other cable television systems operate within this seven county area. The petition, however, only addresses American Cablevision system communities.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, see Arbitron's *Description of Methodology*.

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

> The provisions of [this subsection] reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market. It is not the Committee's intention that these provisions be used by cable systems to manipulate their carriage obligations to avoid compliance with the objectives of this section. Further, this section is not intended to permit a cable system to discriminate among several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one station's market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.[7]

5. The Commission provided guidance in *MM Docket 92-259*, supra, to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

III. ARGUMENTS

7. In its petition and in a reply pleading, American Cablevision argues the KMCI(TV) is a commercial station that is predominantly utilized for the transmission of sales presentations or program length commercials and that it fails to present programming tailored to the local needs and interests of the particular communities serviced by its systems. It accordingly seeks to be relieved of the obligation to carry KMCI(TV)'s signal. Imposition of a carriage obligation, it is said, will cause the systems to remove some service from the expanded basic tier and possibly some service from the basic tier line-up. Although this station has been operating since 1988, its signal has never been carried on the systems in question since the station provides no significant local programming and thus there was no incentive for its signal to be carried. It is said that "only one other major cable system in the [Kansas City] ADI carries KMCI."

8. KMCI(TV), it is contended, has virtually given over its right to broadcast to the Home Shopping Club. In contrast to the alleged paucity of local programming on KMCI(TV), American Cablevision states that several Kansas City area stations that are carried on its systems provide extensive local programming throughout each day. The system itself is also said to offer a number of channels dedicated to local affairs and/or local origination programming. The station's "Issues/Programming Quarterly Report" and "Children's Programming Quarterly Report" are said to reveal only minimal amounts of such programming. Such programming as is run is said to consist of short spots, lasting between 30 seconds and five minutes rerun over and over throughout the day.

9. With respect to audience in the area, it is said that KMCI(TV), after operation for approximately five years, is not even counted by Arbitron in terms of the market's daypart ratings and shares and is not "significantly viewed" in a single county in Kansas or Missouri.

10. In reply, Miller argues that American's petition is simply an effort to avoid carriage of a home shopping station in competition with a home shopping channel contemplated by Time Warner, the system's owner, in conjunction with Spiegel, Inc. Miller contends that the ADI modification procedures contained in the Act and the factors referenced therein were intended principally to facilitate inclusion rather than exclusion of communities in stations' markets. Miller disputes the assertion that its public affairs programming denotes a lack of commitment to the local community. In this regard it notes the station's

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[6] 47 U.S.C. §534(h)(1)(C)(ii). As Congress recognized, "[t]hese factors are not intended to be exclusive . . . ." H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

[7] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).

[8] *MM Docket 92-259*, 8 FCC Rcd at 2977.

[9] *MM Docket 92-259*, 8 FCC Rcd at 2977, 2977 n.139.

[10] 47 C.F.R. §76.59.

issues programs list is, by virtue of the Commission's rules (Section 73.3526), intended to be illustrative only and contain the station's most significant treatment of community issues rather than to be inclusive. KMCI(TV), it is said, broadcasts a regular program "Viewpoint" that provides public affairs programming addressing a wide range of topics responsive to local interests and concerns and that it broadcasts syndicated children's programming consistent with the Commission's recognition "that local needs can be satisfied through the presentation of programming which is not locally produced." With respect to viewership, Miller argues that the use of Arbitron ratings as a benchmark is inappropriate and that a more appropriate measuring stick for its viewership is club membership. KMCI(TV) is said to have "tens of thousands of club members."

IV. DISCUSSION

11. Because American Cablevision has not pointed to particularized and persuasive evidence that the communities in question are outside of KMCI(TV)'s market, based on an analysis the four specific statutory or any other relevant factors, its petition will be denied. We note as a preliminary matter, that the ADI market change process incorporated into the Communications Act is not intended to be a process whereby cable operators may seek relief from the mandatory signal carriage obligations apart from the question of whether a change in the market area involved is warranted. Here the arguments presented are generally not such as assist in resolving whether a change is appropriate -- whether one community rather than another should be included or excluded from the market -- but rather appear directed to whether the signal of KMCI(TV) should be carried regardless of the specific location of the cable communities.

12. The 44 communities here in question are located in Kansas City and surrounding communities in Clay, Jackson, Platte and Cass Counties, Missouri and Wyandotte, Johnson and Leavenworth Counties, Kansas, all of which are within the Kansas City, Missouri ADI. Lawrence, Kansas, KMCI(TV)'s city of license, is considered by Arbitron to be a part of the same ADI and is approximately 35 miles west of Kansas City which is the core of the market and which contains the major population concentration in KMCI(TV)'s existing market area. The rest of the communities in question are between 35 and 54 miles from Lawrence and the 7 counties together contain some three-quarters of the television households in the market. Given the general structure of the market, including the fact that Lawrence is only 35 miles distant from the center of the market, its location not only within the ADI of the market but within the same standard metropolitan statistical area, the Grade A signal coverage by KMCI(TV) of the core of the market, and the high degree of overlap between the service areas of KMCI(TV) and all of the other stations licensed to Kansas City, it appears at the outset that KMCI(TV) is logically part of this ADI as are the cable communities in question.

13. Focusing on the specific factors referenced in the statute, we are unable to conclude that American Cablevision's arguments distinguish these cable communities from the rest of the market. With respect to the question of historical carriage patterns, there is no dispute that the signal of KMCI(TV) has not been carried on the systems in question. The 1992 Cable Act was adopted, however, in part to cure past discriminatory signal carriage practices. Thus, the absence of historical carriage cannot by itself be used to justify a refusal of carriage in the future. Rather, carriage patterns are useful insofar as they provide insight into structure of the market involved. Here the carriage pattern appears, based on petitioner's own comments, to be more related to judgments as to the value of the station's programming, than to its location within the market.[11]

14. Petitioner has also failed to demonstrate that KMCI(TV) does not provide local coverage or service to the Kansas City systems. The fact that KMCI(TV) places a principal city contour over many of the communities and a Grade A or Grade B contour over the remaining communities where American Cablevision's subscribers are located is persuasive evidence that is provides service to these communities. The Commission has noted the importance of such contour coverage in determining local service. With regard to the content of KMCI(TV) programming, the Commission has found that home shopping formats are not incompatible with local appeal and has recognized that such specialized programming traditionally has drawn smaller audiences. The Commission has specifically affirmed that home shopping stations may serve the public interest because, among other reasons, they provide "an important service to viewers who either have difficulty obtaining or do not otherwise wish to purchase goods in a more traditional manner."[12]

15. We also find petitioner's arguments regarding KMCI(TV)'s lack of audience ratings to be unpersuasive. The Commission has previously recognized that stations with limited audiences, once referred to as specialty stations, are nevertheless capable of "offer[ing] desirable diversity of programming . . . ," yet typically attract limited audiences.[13] The fact that speciality stations, and those akin to them such as home shopping stations, attract smaller audience shares, is properly taken into account in determining the equities concerning a station's right to cable carriage. As with the historical carriage issue, audience information is useful if it distinguishes one geographic or market area from another but the information provided by American Cablevision, because it suggests that KMCI(TV) has no audience ratings anyplace, is of no assistance in this regard.

16. Finally, we do not believe that American Cablevision's carriage of other local stations is sufficient to justify exclusion of its system from the above referenced communities.[14] American Cablevision has not sufficiently demonstrated why it is necessary to remove itself from its own ADI, vis-a-vis KMCI(TV), yet remain in the same

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[11] American Cablevision itself specifically points out the absence of carriage by other major cable systems in the ADI.

[12] *See Home Shopping Station Issues*, 8 FCC Rcd 5321, 5327 (1993), *reconsideration pending*.

[13] *First Report and Order in Docket 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

[14] That other ADI licensees do in fact provide coverage of and service to the communities in question is not to the contrary. We do not believe that Congress intended this criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue, but rather that this criterion was intended to enhance a station's claim where it could be shown that other stations *do not* serve the communities at issue.

market with regard to the station's competitors. We find that American Cablevision's petition is inconsistent with Congressional intent which clearly states that the market modification policy was not provided as a means for cable systems to avoid their must carry obligations.[15]

17. In conclusion, because American Cablevision has not pointed to particularized evidence that the communities it serves are not part of KMCI(TV)'s market, based on the four specific statutory factors or any other relevant factors, we find that grant of its petition is not in the public interest.

V. ORDER

18. Accordingly, IT IS ORDERED, pursuant to §614(h) of the Communications Act of 1934, as amended (47 U.S.C. 534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That the captioned petition for special relief, filed October 4, 1993, on behalf of Kansas City Cable Partners d/b/a American Cablevision of Kansas City, IS DENIED. Its petitions having been denied, Kansas City Cable Partners shall comply with the applicable provisions of the Section 614 of the Communications Act and the associated rules within sixty (60) days of the release of this Order.

19. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[15] H.R. Rep. No. 102-628, 102d Cong. 2nd Sess. at 97.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI Telecommunications Corporation,
Complainant,

v.

AT&T Corp., File No. E-94-055
Defendant.

ORDER

Adopted: March 31, 1995; Released: April 7 1995

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On March 7, 1994, MCI Telecommunications Corporation (MCI) filed the above-captioned formal complaint against AT&T Corp., formerly American Telephone & Telegraph Company (AT&T), alleging, *inter alia*, that AT&T had violated Sections 201(b) and 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 202(a), and Section 64.702(e) of the Commission's Rules, 47 C.F.R. § 64.702(e), in connection with a service offer made to, and accepted by, a certain customer for telecommunications service. AT&T denied the allegations and moved to dismiss the complaint.

2. On March 9, 1995, MCI filed a motion for voluntary dismissal of the complaint, with prejudice, stating that it no longer wished to pursue the action against AT&T.

3. We are satisfied that granting MCI's motion will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED pursuant to Sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the formal complaint filed on March 7, 1994, by MCI Telecommunications Corporation against AT&T Corp. IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID No. TX0589
Cleburne, Texas

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in Cleburne, Texas, CUID No. TX0589. Sammons has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint was served on Sammons on September 1, 1993.[11] The Commission received the complaint on September 7, 1993.

5. Sammons attempted to justify its CPS price through an FCC Form 393 filed on October 5, 1993 in response to the complaint. Sammons amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12] On December 27, 1994, Sammons responded to a Commission letter, which requested further clarification of Sammons' showing.[13] Sammons also submitted information on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[14]

III. DISCUSSION

6. In its amended benchmark filing of June 24, 1994, Sammons calculated a maximum permitted rate for the CPS tier of $8.67 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Sammons' price for the period after May 14, 1994 may be required to reflect the fact that Sammons' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was dated September 1, 1993 and states that it was mailed to Sammons on that date. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider September 1, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] Letter from Julia Buchanan, FCC, to Cody Colquitt, Sammons Communications, Inc. (December 20, 1994).

[14] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan.20, 1995).

would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its CPS tier was $8.71 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showing supports a maximum reasonable CPS tier price of $8.67 per month (plus franchise fee) for the period September 7, 1993 to May 14, 1994.[15] However, we further determine that the overcharge is such a de minimis amount that it would not serve the public interest to order a refund.

8. We further conclude that Sammons must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Sammons' price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to Sammons' price for the period after May 14, 1994, upon completion of our review of Sammons' FCC Form 1200 rate filing.

9. We further conclude that Sammons has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 1, 1993 complaint against the cable programming service price charged by Sammons Communications, Inc. in Cleburne, Texas, CUID No. TX0589, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Sammons Communications, Inc. with respect to Cleburne, Texas, CUID No. TX0589, for the period of September 7, 1993 to May 14, 1994, justifies a maximum price of $8.67 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Sammons Communications, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its Cleburne, Texas franchise area, CUID No. TX0589, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

13. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Cleburne, Texas franchise area, CUID No. TX0589, that reflects the reduction in the CPS rate determined in this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] We reviewed Sammons' Form 1200 rate filing and confirmed that Sammons calculated its rates for the period after May 14, 1994 using a rate that we find in this Order to be unreasonable.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID No. TX0805
Fort Worth, Texas

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in Fort Worth, Texas, CUID No. TX0805. Sammons has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint was served on Sammons on February 25, 1994.[11] The Commission received the complaint on February 25, 1994.

5. Sammons attempted to justify its CPS price through an FCC Form 393 filed on April 4, 1994 in response to the complaint. Sammons amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12] On December 27, 1994, Sammons responded to a Commission letter, which requested further clarification of Sammons' showing.[13] Sammons also submitted information on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[14]

III. DISCUSSION

6. In its amended benchmark filing of June 24, 1994, Sammons calculated a maximum permitted rate for the CPS tier of $7.83 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Sammons' price for the period after May 14, 1994 may be required to reflect the fact that Sammons' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was dated February 25, 1994 and states that it was mailed to Sammons on that date. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider February 25, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] Letter from Julia Buchanan, FCC, to Cody Colquitt, Sammons Communications, Inc. (December 20, 1994).

[14] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its CPS tier was $8.00 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showing supports a maximum reasonable CPS tier price of $7.83 per month (plus franchise fee) for the period February 25,1994 to May 14, 1994.[15] However, we further determine that the overcharge is such a de minimis amount that it would not serve the public interest to order a refund.

8. We further conclude that Sammons must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Sammons' price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to Sammons' price for the period after May 14, 1994, upon completion of our review of Sammons' FCC Form 1200 rate filing.

9. We further conclude that Sammons has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the February 25, 1994 complaint against the cable programming service price charged by Sammons Communications, Inc. in Fort Worth, Texas, CUID No. TX0805, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Sammons Communications, Inc. with respect to Fort Worth, Texas, CUID No. TX0805, for the period of February 25, 1994 to May 14, 1994, justifies a maximum price of $7.83 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Sammons Communications, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its Fort Worth, Texas franchise area, CUID No. TX0805, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

13. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Fort Worth, Texas franchise area, CUID No. TX0805, that reflects the reduction in the CPS rate determined in this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to hhthis proceeding not specifically addressed herein.

[16] We reviewed Sammons' Form 1200 rate filing and confirmed that Sammons calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID No. TX0397
Borger, Texas

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in Borger, Texas. CUID No. TX0397. Sammons has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint was served on Sammons on March 22, 1994. The Commission received the complaint on March 28, 1994.[11]

5. Sammons attempted to justify its CPS price through an FCC Form 393 filed on March 31, 1994 in response to the complaint. Sammons amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12] On December 27, 1994, Sammons responded to a Commission letter, which requested further clarification of Sammons' showing.[13] Sammons also submitted information on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[14]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Sammons' price for the period after May 14, 1994 may be required to reflect the fact that Sammons' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was initially filed on February 28, 1994, but it was returned by hhthe Commission on March 17, 1994 pursuant to 47 C.F.R. § 76.954. The complainant timely filed a corrected complaint on March 28, 1994. *See* 47 C.F.R. § 00:76 .955. The refiled complaint was signed March 22, 1994 and states that it was mailed to Sammons on February 25, 1994. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider March 22, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] Letter from Julia Buchanan, FCC, to Cody Colquitt, Sammons Communications, Inc. (December 20, 1994).

[14] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

III. DISCUSSION

6. In its amended benchmark filing of June 24, 1994, Sammons calculated a maximum permitted rate for the CPS tier of $11.90 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its CPS tier was $12.25 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showing supports a maximum reasonable CPS tier price of $11.90 per month (plus franchise fee) for the period March 28, 1994 to May 14, 1994.[15] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. We further conclude that Sammons must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Sammons' price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to Sammons' price for the period after May 14, 1994, upon completion of our review of Sammons' FCC Form 1200 rate filing.

9. We further conclude that Sammons has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the March 22, 1994 complaint against the cable programming service price charged by Sammons Communications, Inc. in Borger, Texas, CUID No. TX0397, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Sammons Communications, Inc. with respect to Borger, Texas, CUID No. TX0397, for the period of March 28, 1994 to May 14, 1994, justifies a maximum price of $11.90 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Sammons Communications, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from March 28, 1994[18] to May 14, 1994, that exceeded $11.90 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Sammons Communications, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its Borger, Texas franchise area, CUID No. TX0397, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Borger, Texas franchise area, CUID No. TX0397, that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] We reviewed Sammons' Form 1200 rate filing and confirmed that Sammons calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID No. TX1214
Burleson, Texas

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in Burleson, Texas, CUID No. TX1214. Sammons has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint was served on Sammons on January 17, 1994.[11] The Commission received the complaint on January 21, 1994.

5. Sammons attempted to justify its CPS price through an FCC Form 393 filed on February 25, 1994 in response to the complaint. Sammons amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[12] and on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[13]

III. DISCUSSION

6. In its amended benchmark filing of June 24, 1994, Sammons calculated a maximum permitted rate for the CPS tier of $8.02 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Sammons' price for the period after May 14, 1994 may be required to reflect the fact that Sammons' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint states that it was mailed to Sammons on January 17, 1994. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider January 17, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

CPS tier was $8.17 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showing supports a maximum reasonable CPS tier price of $8.02 per month (plus franchise fee) for the period January 21, 1994 to May 14, 1994.[14] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. We further conclude that Sammons must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Sammons' price during the earlier period was unreasonable.[15] We reserve the right to make further adjustments to Sammons' price for the period after May 14, 1994, upon completion of our review of Sammons' FCC Form 1200 rate filing.

9. We further conclude that Sammons has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[16] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 17, 1994 complaint against the cable programming service price charged by Sammons Communications, Inc. in Burleson, Texas, CUID No. TX1214, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Sammons Communications, Inc. with respect to Burleson, Texas, CUID No. TX1214, for the period of January 21, 1994 to May 14, 1994, justifies a maximum price of $8.02 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Sammons Communications, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from January 21, 1994[17] to May 14, 1994, that exceeded $8.02 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Sammons Communications, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its Burleson, Texas franchise area, CUID No. TX1214, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Burleson, Texas franchise area, CUID No. TX1214, that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] We reviewed Sammons' Form 1200 rate filing and confirmed that Sammons calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[16] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID No. TX0550
Mansfield, Texas

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in Mansfield, Texas, CUID No. TX0550. Sammons has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint was served on Sammons on January 17, 1994.[11] The Commission received the complaint on January 21, 1994.

5. Sammons attempted to justify its CPS price through an FCC Form 393 filed on February 25, 1994 in response to the complaint. Sammons amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12] On December 27, 1994, Sammons responded to a Commission letter, which requested further clarification of Sammons' showing.[13] Sammons also submitted information on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[14]

III. DISCUSSION

6. In its amended benchmark filing of June 24, 1994, Sammons calculated a maximum permitted rate for the CPS tier of $7.93 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Sammons' price for the period after May 14, 1994 may be required to reflect the fact that Sammons' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint states that it was mailed to Sammons on January 17, 1994. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider January 17, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] Letter from Julia Buchanan, FCC, to Cody Colquitt, Sammons Communications, Inc. (December 20, 1994).

[14] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its CPS tier was $8.08 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showing supports a maximum reasonable CPS tier price of $7.93 per month (plus franchise fee) for the period January 21, 1994 to May 14, 1994.[15] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. We further conclude that Sammons must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Sammons' price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to Sammons' price for the period after May 14, 1994, upon completion of our review of Sammons' FCC Form 1200 rate filing.

9. We further conclude that Sammons has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 17, 1994 complaint against the cable programming service price charged by Sammons Communications, Inc. in Mansfield, Texas, CUID No. TX0550, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Sammons Communications, Inc. with respect to Mansfield, Texas, CUID No. TX0550, for the period of January 21, 1994 to May 14, 1994, justifies a maximum price of $7.93 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Sammons Communications, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from January 21, 1994[18] to May 14, 1994, that exceeded $7.93 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Sammons Communications, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its Mansfield, Texas franchise area, CUID No. TX0550, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Mansfield, Texas franchise area, CUID No. TX0550, that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] We reviewed Sammons' Form 1200 rate filing and confirmed that Sammons calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID No. TX1215
Edgecliff, Texas

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in Edgecliff, Texas, CUID No. TX1215. Sammons has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint was served on Sammons on January 17, 1994.[11] The Commission received the complaint on January 21, 1994.

5. Sammons attempted to justify its CPS price through an FCC Form 393 filed on February 25, 1994 in response to the complaint. Sammons amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[12] and on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[13]

III. DISCUSSION

6. In its amended benchmark filing of June 24, 1994, Sammons calculated a maximum permitted rate for the CPS tier of $7.85 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Sammons' price for the period after May 14, 1994 may be required to reflect the fact that Sammons' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint states that it was mailed to Sammons on January 17, 1994. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider January 17, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

CPS tier was $8.00 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showing supports a maximum reasonable CPS tier price of $7.85 per month (plus franchise fee) for the period January 21, 1994 to May 14, 1994.[14] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. We further conclude that Sammons must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Sammons' price during the earlier period was unreasonable.[15] We reserve the right to make further adjustments to Sammons' price for the period after May 14, 1994, upon completion of our review of Sammons' FCC Form 1200 rate filing.

9. We further conclude that Sammons has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[16] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 17, 1994 complaint against the cable programming service price charged by Sammons Communications, Inc. in Edgecliff, Texas, CUID No. TX1215, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Sammons Communications, Inc. with respect to Edgecliff, Texas, CUID No. TX1215, for the period of January 21, 1994 to May 14, 1994, justifies a maximum price of $7.85 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Sammons Communications, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from January 21, 1994[17] to May 14, 1994, that exceeded $7.85 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R: § 76.922(b)(4)(C), that Sammons Communications, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its Edgecliff, Texas franchise area, CUID No. TX1215, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Edgecliff, Texas franchise area, CUID No. TX1215, that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] We reviewed Sammons' Form 1200 rate filing and confirmed that Sammons calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[16] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID No. TX0647
Benbrook, Texas

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in Benbrook, Texas, CUID No. TX0647. Sammons has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint was served on Sammons on January 17, 1994.[11] The Commission received the complaint on January 21, 1994.

5. Sammons attempted to justify its CPS price through an FCC Form 393 filed on February 25, 1994 in response to the complaint. Sammons amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12] On December 27, 1994, Sammons responded to a Commission letter, which requested further clarification of Sammons' showing.[13] Sammons also submitted information on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[14]

III. DISCUSSION

6. In its amended benchmark filing of June 24, 1994, Sammons calculated a maximum permitted rate for the CPS tier of $7.85 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Sammons' price for the period after May 14, 1994 may be required to reflect the fact that Sammons' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint states that it was mailed to Sammons on January 17, 1994. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider January 17, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] Letter from Julia Buchanan, FCC, to Cody Colquitt, Sammons Communications, Inc. (December 20, 1994).

[14] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its CPS tier was $8.00 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showing supports a maximum reasonable CPS tier price of $7.85 per month (plus franchise fee) for the period January 21, 1994 to May 14, 1994.[15] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. We further conclude that Sammons must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Sammons' price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to Sammons' price for the period after May 14, 1994, upon completion of our review of Sammons' FCC Form 1200 rate filing.

9. We further conclude that Sammons has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 17, 1994 complaint against the cable programming service price charged by Sammons Communications, Inc. in Benbrook, Texas, CUID No. TX0647, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Sammons Communications, Inc. with respect to Benbrook, Texas, CUID No. TX0647, for the period of January 21, 1994 to May 14, 1994, justifies a maximum price of $7.85 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Sammons Communications, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from January 21, 1994[18] to May 14, 1994, that exceeded $7.85 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Sammons Communications, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its Benbrook, Texas franchise area, CUID No. TX0647, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Benbrook, Texas franchise area, CUID No. TX0647, that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] We reviewed Sammons' Form 1200 rate filing and confirmed that Sammons calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID No. TX0711
Kennedale, Texas

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in Kennedale, Texas, CUID No. TX0711. Sammons has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection andCompetition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint was served on Sammons on January 17, 1994.[11] The Commission received the complaint on January 21, 1994.

5. Sammons attempted to justify its CPS price through an FCC Form 393 filed on February 25, 1994 in response to the complaint. Sammons amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12] On December 27, 1994, Sammons responded to a Commission letter, which requested further clarification of Sammons' showing.[13] Sammons also submitted information on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[14]

III. DISCUSSION

6. In its amended benchmark filing of June 24, 1994, Sammons calculated a maximum permitted rate for the CPS tier of $7.85 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Sammons' price for the period after May 14, 1994 may be required to reflect the fact that Sammons' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint states that it was mailed to Sammons on January 17, 1994. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state /when service occurred. Under these circumstances, we will (consider January 17, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] Letter from Julia Buchanan, FCC, to Cody Colquitt, Sammons Communications, Inc. (December 20, 1994).

[14] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its CPS tier was $8.00 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showing supports a maximum reasonable CPS tier price of $7.85 per month (plus franchise fee) for the period January 21,8 1994 to May 14, 1994.[15] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. We further conclude that Sammons must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Sammons' price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to Sammons' price for the period after May 14, 1994, upon completion of our review of Sammons' FCC Form 1200 rate filing.

9. We further conclude that Sammons has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 17, 1994 complaint against the cable programming service price charged by Sammons Communications, Inc. in Kennedale, Texas, CUID No. TX0711, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Sammons Communications, Inc. with respect to Kennedale, Texas, CUID No. TX0711, for the period of January 21, 1994 to May 14, 1994, justifies a maximum price of $7.85 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Sammons Communications, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from January 21, 1994[18] to May 14, 1994, that exceeded $7.85 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Sammons Communications, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its Kennedale, Texas franchise area, CUID No. TX0711, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Kennedale, Texas franchise area, CUID No. TX0711, that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] We reviewed Sammons' Form 1200 rate filing and confirmed that Sammons calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Ohio, Inc.

Appeal of Local
Rate Order of City of
Warren, Ohio

ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 28, 1994, TCI Cablevision of Ohio, Inc. ("TCI"), the franchisee in the above matter, filed an appeal of the local rate order ("rate order") adopted on September 28, 1994 by its local franchising authority, the City of Warren, Ohio ("the City").[1] On December 12, 1994, the City filed an opposition to TCI's appeal. TCI did not file a reply. The rate order establishes a new regulated rate schedule for TCI's basic service tier rates and associated equipment.[2] Specifically, the City's rate order requires TCI to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. In its review of TCI's Form 393, the City approved TCI's rates for equipment and installation,[3] but ordered TCI to lower its actual rate for the basic service tier to the City's prescribed maximum permitted level and to issue refunds accordingly. On appeal, TCI argues that the City erred in its inflation adjustment calculation, resulting in a $.03 basic service overcharge. TCI also argues that the City's rate order ignores the Commission's instructions for the calculation of refunds, which it asserts require that any overcharges be offset by any undercharges.

3. In its Opposition, the City explains that the reason for the difference in the maximum permitted rate found by the City and TCI for the basic service tier is attributable to the differing methods by which the City and TCI calculated the inflation adjustment in Worksheet 1 to Form 393. Prior to filing its Opposition, the City reviewed and modified its inflation adjustment calculation method.[4] As a result, the City has decided that, "for purposes of this appeal, [it] concedes that the maximum permitted rate which TCI is entitled to charge for the basic service tier is $9.52 per month."[5] Because the maximum permitted rate for the basic service tier as recalculated by the City is identical to that arrived at by TCI in its Form 393, this issue is moot. However, since TCI's actual rate for its basic service tier is $9.53, which is $0.01 more than the maximum permitted rate, we still must address the issue of proper calculation of refunds. In response to the refund calculation issue, the City argues that, contrary to TCI's assertion, the Commission's rules do not authorize a balancing of past overcharges and undercharges in ordering a refund.[6]

II. DISCUSSION

4. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[7] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[8] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[9] If the Commission reverses a franchising authority's decision, it will not substitute its own decision,

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[1] Along with its Appeal of Local Rate Order, TCI also filed a Request for Emergency Stay on October 28, 1994. While the City "does not stipulate to any facts or legal conclusions advanced by TCI in the Request," it agreed *sua sponte* to stay its local rate order pending the resolution of this appeal. *See* City of Warren's Stipulation to Request for Emergency Stay (November 7, 1994). Because we are resolving this dispute on the merits presented in the appeal, the Request for Emergency Stay has been rendered moot.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] The City approved TCI's rates for equipment and installation, finding those rates to be either equal to or less than the maximum permitted level. *See* Appeal, Attachment A (City of Warren's rate order, Ordinance No. 10701/94, at 3). For example, on the Cover Sheet (Part I) of its Form 393, TCI's maximum permitted rate for remote controls is listed as $0.13 per month, while its actual rate is listed as $0.10 per month. TCI's maximum permitted rate for type 2 converter boxes is listed as $1.47 per month, while its actual rate is listed as $1.15 per month.

[4] *See* Opposition Brief, at 8.

[5] *Id.*

[6] The City also argues that it is improper to raise the refund offset issue for the first time on appeal. We disagree. In an appeal of a local rate order, the Commission determines whether there is a reasonable basis for a local franchising authority's order and whether the local rate order is consistent with the Cable Act or our rules. *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5728-5730 (1993) (*"Report and Order"*). If an operator believes that some aspect of a local rate order is inconsistent with our rules, the operator may appeal that issue to the Commission, even if the operator did not raise the issue in the local rate proceeding. However, this does not excuse an operator from its obligation to provide all necessary information to the local franchising authority in a timely manner. *See* New England Cablevision of Massachusetts, Inc. (Commonwealth of Massachusetts Community Antenna Television Commission), DA 94-1607, ¶ ¶ 6-8 (Cab. Serv. Bur., released December 28, 1994).

[7] 47 C.F.R. § 76.944.

[8] *See Report and Order* at 5731. Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*) .

[9] *Third Recon. Order* at 4346.

but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[10]

5. FCC Form 393 is the official form used by regulators to determine whether a cable operator's rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[11] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

6. The operator's maximum permitted rates are derived by completing Parts II and III of Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[12] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual costs and are calculated in Part III of Form 393. In this proceeding, the City approved the maximum permitted rates for equipment and installation calculated by TCI in its Form 393, but the City did not provide for the possibility of offsetting TCI's undercharges for equipment and installation against its overcharge for basic service.

7. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[13] If an operator's aggregate revenues computed from its actual rates exceed its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[14] If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by TCI should be calculated based on this method.

8. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[15] In this case, the City must offset or reduce any refunds it may order by the difference between the actual equipment and installation rates that TCI charged and the maximum permitted rates that it could have charged during the applicable period of review.[16] We are remanding this issue to the City so that it can reconsider its ruling in a manner consistent with these findings.[17]

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that TCI Cablevision of Ohio, Inc.'s appeal of the City of Warren, Ohio's local rate order, regarding the issue of inflation adjustment is DISMISSED as moot.

10. IT IS FURTHER ORDERED that TCI Cablevision of Ohio Inc.'s appeal of the City of Warren, Ohio's local rate order, regarding the issue of refund calculation is REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

11. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

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[10] *Id.*

[11] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[12] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[13] *See* 47 C.F.R. § 76.942.

[14] *See Third Recon. Order* at 4353 ("Although maximum permitted rates are always determined in an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

[15] *See Report and Order* at 5731; *Third Recon. Order* at 4346. In its Opposition, the City expressed concern that, if we allow TCI to offset any overcharges by any undercharges, it would be compelled to conduct a "burdensome and unworkable" process of auditing "a cable operator's subscriber billings . . . to determine the exact amounts of undercharges and overcharges." Opposition Brief, at 4. We find, however, that such a process would be unnecessary. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, and then subsequently approves the operator's maximum permitted rates, an auditing is not necessary when calculating an operator's refund liability.

[16] *See Third Recon. Order* at 4353.

[17] *See* TCI Cablevision of North Central Kentucky, Inc. (Mount Washington, KY), DA 94-1479 (Cab. Serv. Bur., released December 14, 1994); *see also* Community TV Corporation (Town of Alton, N.H.), DA 95-147 (Cab. Serv. Bur., released February 6, 1995).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of	CUID Nos. MI0167,
Greater Michigan, Inc.	MI0168, MI0537,
Village of Mackinaw	MI0593, MI0594,
City, Michigan	MI0685, MI0904,
City of Cheboygan, Michigan	MI0952 and MI1535
Township of Thomas, Michigan	
City of Montrose, Michigan	
Township of Montrose, Michigan	
Village of Chesaning, Michigan	
Township of Richland, Michigan	
Township of Jonesfield, Michigan	
Township of Chesaning, Michigan	

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices TCI Cablevision of Greater Michigan, Inc. ("TCI") was charging for its cable programming service ("CPS") tier in the Michigan communities designated by the community unit identification ("CUID") numbers referenced above. TCI has chosen to attempt to justify its prices through benchmark showings by filing amended FCC Form 393s for each of these communities.[1] This Order addresses the reasonableness of TCI's CPS tier price for each of these communities only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price for each of these communities after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas addressed in this Order were completed and served on TCI and received by the Commission on the dates set forth in Appendix A.

5. TCI attempted to justify its CPS price for each franchise area through FCC Form 393s filed on the dates noted in Appendix B. On May 27, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12] TCI filed amended FCC Form 393s for each franchise area.

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[1] For the sake of convenience, those franchise areas for which TCI filed identical 393s have been grouped together. The franchise area represented by CUID No. MI0168 is referred to herein as Group 1. The franchise areas represented by CUID Nos. MI0685 and MI1535 are referred to herein as Group 2. The franchise area represented by CUID No. MI0167 is referred to herein as Group 3. The franchise areas represented by CUID Nos. MI0593 and MI0594 are referred to herein as Group 4. The franchise areas represented by CUID Nos. MI0537, MI0904 and MI0952 are referred to herein as Group 5.

[2] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent TCI has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which TCI implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 are found to be excessive, reductions in TCI's prices for the period after May 14, 1994 may be required to reflect the fact that TCI's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) .

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, ¶ ¶ 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

III. DISCUSSION

6. In its amended benchmark filings of May 27, 1994, TCI calculated a maximum permitted price for the CPS tier for the franchise areas in Groups 1, 3 and 4 of $10.54 per month and for the franchise areas in Group 5 of $10.62 per month. However, TCI's actual price for the CPS tier for the franchise area in Group 1 was $11.00 per month, for the franchise area in Group 3 it was $11.49 per month, for the franchise areas in Group 4 it was $10.71 per month and for the franchise areas in Group 5 it was $10.78 per month. Thus, for Groups 1, 3, 4 and 5 TCI has failed to demonstrate that its CPS tier prices were not unreasonable. Furthermore, as discussed below, we have found an error in TCI's calculation of its maximum permitted CPS tier prices for the franchise areas in Groups 1, 3, 4, and 5 that requires us to recalculate those prices.

7. For the franchise areas in Group 2, TCI asserts that its monthly CPS tier price of $11.21 per subscriber is justified by its benchmark filings because its price is less than the maximum permitted charge of $11.39 as calculated in its amended filings. Upon review, however, we have determined that TCI has made the same error in calculating its maximum permitted price with respect to the franchise areas in Group 2 as in its calculation of its maximum permitted price with respect to the franchise areas in Groups 1, 3, 4 and 5. It is therefore appropriate to make the following adjustment to TCI's calculations in its amended Form 393s:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[13] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[14] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead.[15] When completed correctly Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. TCI, however, has not properly completed Part III of its FCC Form 393s and thus has not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III TCI has not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B it has not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if TCI's Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that TCI makes in its Schedule B Analyses, however, indicate that its own employees performed customer equipment installation and maintenance.

c. Not only are TCI's Schedule B allocations inconsistent with not having any maintenance facility costs, its allocations are also inconsistent with the argument that the repair of converters and remotes was performed off premises by a third party. If this statement were true, then there should be an allocation for the cost of third-party or contract labor. TCI's Schedule B Analyses, however, do not allocate any contract labor to customer equipment installation and maintenance.

d. TCI has included on its Schedule B Analyses entries for "Converter Maintenance."[16] These entries, however, further indicate that TCI has not fully unbundled its equipment costs from its regulated service costs. In its Part III, Step C, Line 9 explanations, TCI sets forth the number of hours it devoted to maintenance and service of remotes and converters.[17] The numbers of hours TCI allocates to maintenance and service of remotes and converters are inconsistent with the converter maintenance costs it reports. Even assuming that its converter maintenance entries are intended to represent only TCI's labor costs, these entries result in per hour labor costs that are clearly implausible.[18] Thus, these converter maintenance entries cannot represent all of TCI's converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that TCI has not included on Form 393, Part III.[19]

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[13] 47 U.S.C. § 543(b)(3).

[14] 47 C.F.R. § 76.923(b).

[15] *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[16] TCI's Converter Maintenance entries on its Schedule B Analysis are as follows: for Group 1 TCI entered $43.32; for Group 2 TCI entered $166.35; for Group 3 TCI entered $15.06; for Group 4 TCI entered $357.88; and for Group 5 TCI entered $1,684.16.

[17] The total number of maintenance and service hours TCI reports for remotes and converters are as follows: for Group 1 TCI reported 218 hours; for Group 2 TCI reported 43 hours (according to TCI's Form 393, Part III, Lines 9 and 16 entries this number should have been 44 hours); for Group 3 TCI reported 113 hours; for Group 4 TCI reported 93 hours; and for Group 5 TCI reported 440 hours.

[18] Using the figures TCI provides its per hour labor costs are as follows: for Group 1 its reported labor cost is $0.19 per hour; for Group 2 its reported labor cost is $3.86 per hour; for Group 3 its reported labor cost is $0.13 per hour; for Group 4 its reported labor cost is $3.84 per hour; and for Group 5 its reported labor cost is $3.82 per hour.

[19] We also note that TCI has failed correctly to gross-up its taxes on Schedules A and C. If TCI is charging a wire maintenance fee, as it is charging in other Michigan franchise areas it serves, we would expect to see these costs reflected in TCI's rate justification filings. Both of these facts provide additional evidence that TCI has not fully unbundled its equipment costs

e. TCI has not justified its Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[20] Simply put, TCI cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since TCI has not justified its Part III allocations and has not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that TCI's Part II, Worksheet 3, Line 303 entry should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[21] We have further determined that in order to yield an unbundling figure of $0.060 per subscriber per channel, TCI must have incurred more installation and customer equipment costs than it reported, and we have therefore revised its entries on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301.[22] While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

8. Because of this error, we conclude that TCI has failed to demonstrate that its maximum permitted price for the CPS tier in each of its franchise areas was not unreasonable. We will therefore set a maximum permitted price for this tier in each of the franchise areas, incorporating the adjustment discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which TCI filed.[23] On its amended Form 393s, TCI calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on July 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date TCI used in justifying its rates for all the franchise areas under consideration in this Order, of 1.030.[24]

9. For Group 1, these adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $10.54 (as TCI calculated) to $10.23. For Group 2, these adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $11.39 (as TCI calculated) to $10.89. For Group 3, these adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $10.54 (as TCI calculated) to $9.99. For Group 4, these adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $10.54 (as TCI calculated) to $10.05. For Group 5, these adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $10.62 (as TCI calculated) to $9.99.

IV. CONCLUSIONS

10. Upon review of the record herein, we conclude that TCI's showing supports a maximum reasonable CPS tier price per month for each franchise area as set forth in Appendix C (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[25] We further determine that with respect to each of the franchise areas discussed in this Order we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

11. We further conclude that for the period after May 14, 1994, TCI must reflect in its Form 1200 rate filings for each of the franchise areas addressed in this Order the fact that TCI's prices during the earlier period were unreasonable.[26] We reserve the right to make further adjustments to TCI's prices for the period after May 14, 1994, upon completion of our review of TCI's FCC Form 1200 rate filings.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable

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from its programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of TCI's permitted rates that may be caused by these errors.

[20] *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[21] *Cf. United Video Cablevision, Inc.*, CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur., released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

[22] Specially, on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301 we have entered the following revised figures: for Group 1 we have entered $3,174.78; for Group 2 we have entered $942.36; for Group 3 we have entered $1,266.90; for Group 4 we have entered $1,999.08; and for Group 5 we have entered $10,524.00.

[23] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[24] *See* Appendix C.

[25] These findings are based solely on the representations of TCI listed in paragraph 5, *supra*, and the modifications described in paragraphs 7 and 8, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[26] We reviewed TCI's Form 1200 rate filings and confirmed that TCI calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

programming service prices charged by TCI Cablevision of Greater Michigan, Inc. in the franchise areas addressed in this Order, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the benchmark filings submitted by TCI Cablevision of Greater Michigan, Inc. with respect to each of the franchise areas addressed in this Order for the period beginning with the filing of the first valid complaint in each franchise area (as set forth in Appendix A) and ending on May 14, 1994, justify the maximum price per month for each franchise area set forth in Appendix C (plus franchise fee) for TCI Cablevision of Greater Michigan, Inc.'s cable programming service tiers.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that TCI Cablevision of Greater Michigan, Inc. shall refund to subscribers in each franchise area that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth in Appendix A)[27] to May 14, 1994, that exceeded the maximum permitted price per month set forth in Appendix C (plus franchise fee) and was thus unreasonable, plus interest to the date of therefund.

15. IT IS FURTHER ORDERED that TCI Cablevision of Greater Michigan, Inc. shall promptly determine the overcharges to CPS subscribers in each franchise area for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amounts so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that TCI Cablevision of Greater Michigan, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to each of its franchise areas addressed in this Order for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for each franchise area (plus franchise fee).

17. IT IS FURTHER ORDERED that TCI Cablevision of Greater Michigan, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, CPS tier prices that reflect the reductions in the CPS rate determined in this Order for each of the franchise areas addressed in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
Group 1		
MI0168	11/29/93	11/23/93
Group 2		
MI0685	10/18/93	10/12/93
MI1535	10/20/93	10/11/93
Group 3		
MI0167	11/8/93	11/1/93
Group 4		
MI0593	10/18/93	10/14/93
MI0594	10/12/93	10/7/93
Group 5		
MI0537	12/20/93	12/14/93
MI0904	10/18/93	10/11/93
MI0952	12/27/93	12/21/93

Appendix B

CUID No.	393 Filing Dates Prior to May 27, 1994
Group 1	
MI0168	11/22/93; 12/3/93
Group 2	
MI0685	11/22/93; 1/26/94
MI1535	1/26/94
Group 3	
MI0167	12/15/93
Group 4	
MI0593	11/22/93; 1/26/94
MI0594	11/15/93; 1/26/94
Group 5	
MI0537	11/26/93; 1/26/94
MI0904	11/22/93; 1/26/94
MI0952	1/26/94

Appendix C

CUID No.	Inflation Adjustment Factor	Maximum Permitted Rate
Group 1		
MI0168	1.030	$10.23
Group 2		
MI0685	1.030	$10.89
MI1535	1.030	$10.89
Group 3		
MI0167	1.030	$9.99
Group 4		
MI0593	1.030	$10.05
MI0594	1.030	$10.05
Group 5		
MI0537	1.030	$9.99
MI0904	1.030	$9.99
MI0952	1.030	$9.99

[27] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Maryland, Inc.
Cecil County, Maryland

CUID No. MD0062

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider a complaint about the price TCI Cablevision of Maryland, Inc. ("TCI") was charging for its cable programming service ("CPS") tier in Cecil County, Maryland, CUID No. MD0062. TCI has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of TCI's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. TCI asserts that its CPS tier price of $8.77 per month is justified by its benchmark filing because its price is equal to the maximum permitted charge of $8.77, as TCI calculated in its amended FCC Form 393 filed May 17, 1994. Upon review, we have found no apparent errors that would require a recalculation of TCI's maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by TCI Cablevision of Maryland, Inc. in Cecil County, Maryland, CUID No. MD0062, IS DENIED TO THE EXTENT INDICATED HEREIN.[12]

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent TCI has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which TCI implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *Second Order on Reconsideration*, 9 FCC Rcd at 4190, ¶ ¶ 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] While TCI's Form 393, Part III, Schedule A does not show any maintenance facility expense and its Schedule B Analysis does not show any contract labor expense, correction of those entries does not result in a reduction of TCI's maximum permitted CPS tier price.

[12] This finding is based solely on the representations of TCI. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Greater Michigan, Inc.	CUID Nos. MI0510, MI0644 and MI1533
City of Freemont, Michigan	
Township of Sheridan, Michigan	
Township of Brooks, Michigan	

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price TCI Cablevision of Greater Michigan, Inc. ("TCI") was charging for its cable programming service ("CPS") tier in the Michigan communities designated by the community unit identification ("CUID") numbers referenced above. TCI has chosen to attempt to justify its price through a benchmark showing by filing amended FCC Form 393s for each of these communities that are identical in all respects. This Order addresses the reasonableness of TCI's CPS tier price for each of these communities only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price for each of these communities after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its rates through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas addressed in this Order were completed and served on TCI and received by the Commission on the dates set forth in Appendix A.

5. TCI attempted to justify its CPS price for each franchise area through identical FCC Form 393s filed on January 10, 1994. On May 27, 1994, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[11] TCI filed amended FCC Form 393s that were identical in all respects for each franchise area.

6. On May 31, 1994, the local franchising authorities ("LFAs") for the City of Freemont, Michigan and the Township of Sheridan, Michigan filed identical motions captioned as a "Request For Default and To Supplement the Record." The LFAs request that we find TCI in default for its failure to file and serve timely and proper responses to their rate complaints. The LFAs state that TCI filed its rate justifications late, in an incomplete fashion and not on the proper form. They also state that in February 1994, TCI began charging a home wire maintenance fee which is not reflected in its rate justification filings. In addition, the LFAs argues that TCI incorrectly counted the number of satellite channels in its rate justifications.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent TCI has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which TCI implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in TCI's price for the period after May 14, 1994 may be required to reflect the fact that TCI's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order*, MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, ¶ ¶ 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

7. In response, we note that on May 27, 1994, TCI did file its rate justifications on the proper form within the "window of opportunity" established in our May 23, 1994 Order.[12] We also note that while TCI may have filed its rate justifications in an untimely fashion, we calculate the Inflation Adjustment Factor for each franchise area based on the date TCI should have used in justifying its rate for that franchise area. With regard to TCI's satellite channel count, we note that we have reviewed this matter as part of our general review of TCI's rate justification filings. The wire maintenance fee issue is addressed below. Accordingly, we grant in part and deny in part the LFA's motions.

III. DISCUSSION

8. TCI asserts that its monthly CPS tier price of $10.91 per subscriber is justified by its benchmark filings because its price is equal to the maximum permitted charge of $10.91 as calculated in its amended filings. Upon review, however, we have determined that TCI has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to TCI's calculations in the Form 393s:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs. [13] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[14] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[15] When completed correctly Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. TCI, however, has not properly completed Part III of its FCC Form 393s and thus has not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III TCI has not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B it has not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if TCI's Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that TCI makes in its Schedule B Analysis, however, indicate that its own employees performed customer equipment installation and maintenance.

c. Not only are TCI's Schedule B allocations inconsistent with not having any maintenance facility costs, its allocations are also inconsistent with the argument that the repair of converters and remotes was performed off premises by a third party. If this statement were true, then there should be an allocation for the cost of third-party or contract labor. TCI's Schedule B Analysis, however, does not allocate any contract labor to customer equipment installation and maintenance.

d. TCI has included on its Schedule B Analysis an entry of $147.21 for "Converter Maintenance." This entry, however, further indicates that TCI has not fully unbundled its equipment costs from its regulated service costs. In its Part III, Step C, Line 9 explanation, TCI states that it devoted 122 hours to maintenance and service of remotes and converters.[16] This number of hours allocated to maintenance and service of remotes and converters is inconsistent with having a converter maintenance cost of $147.21. Even assuming that $147.21 is intended to represent only TCI's labor costs, this would indicate a cost to TCI of only $1.20 per hour, clearly an implausible figure. Thus, $147.21 cannot represent all of TCI's converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that TCI has not included on Form 393, Part III.[17]

e. TCI has not justified its Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[18] Simply put, TCI cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since TCI has not justified its Part III allocations and has not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that TCI's Part II, Worksheet 3, Line 303 entry should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this

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[12] *Id.*

[13] 47 U.S.C. § 543(b)(3).

[14] 47 C.F.R. § 76.923(b).

[15] *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[16] *See also* TCI's FCC Form 393s at Part III, Lines 9 and 16.

[17] We also note that TCI has failed correctly to gross-up its taxes on Schedules A and C. We further note that if, as the LFAs assert, TCI is charging a wire maintenance fee we would expect to see these costs reflected in TCI's rate justification filings. Both of these facts provide additional evidence that TCI has not fully unbundled its equipment costs from its programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of TCI's permitted rates that may be caused by these errors.D

[18] *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[19] We have furtherp determined that in order to yield an unbundling figure of $0.060 per subscriber per channel, TCI must have incurred $2,889.72 of installation and customer equipment costs, and we have therefore entered this figure on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301. While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

9. Because of this error, we conclude that TCI has failed to demonstrate that its maximum permitted price for the CPS tier was not unreasonable. We will therefore set a maximum permitted price for this tier, incorporating the adjustment discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4.

a. On its amended Form 393s, TCI calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on July 31, 1993. For CUID Nos. MI0644 and MI1533, October 31, 1993, is a permissible base date. We must, however, recalculate the Inflation Adjustment Factor for these two franchise areas using the most accurate data currently available for the date for which TCI filed.[20] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date TCI used in justifying its rates for CUID Nos. MI0644 and MI1533, of 1.030.[21]

b. For CUID No. MI0510, however, TCI cannot permissibly calculate inflation through the end of October 1993. In this franchise area, TCI was served with a rate complaint in September 1993.[22] The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." In general, a cable operator must submit a justification of its rates no more than 30 days after service of the earliest valid complaint.[23] TCI cannot be permitted to claim an additional inflation adjustment simply because it did not file its Form 393 within this 30-day period. For this franchise area, therefore, we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the latest date contemplated by the Form 393 instructions. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through September 1993, the base date TCI should have used in justifying its rate for CUID No. MI0510, of 1.028.[24]

10. For CUID Nos. MI0644 and MI1533, these adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $10.91 (as TCI calculated) to $10.15. For CUID No. MI0510, these adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $10.91 (as TCI calculated) to $10.13.

IV. CONCLUSIONS

11. Upon review of the record herein, we conclude that TCI's showing for CUID Nos. MI0644 and MI1533 supports a maximum reasonable CPS tier price of $10.15 per month (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994. We also conclude that TCI's showing for CUID No. MI0510 supports a maximum reasonable CPS tier price of $10.13 per month (plus franchise fee) for the period from October 4, 1993 to May 14, 1994.[25] We further determine that with respect to each of the franchise areas discussed in this Order we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

12. We further conclude that for the period after May 14, 1994, TCI must reflect in its Form 1200 rate filings for each of thefranchise areas addressed in this Order the fact that TCI's prices during the earlier period were unreasonable.[26] We reserve the right to make further adjustments to TCI's prices for the period after May 14, 1994, upon completion of our review of TCI's FCC Form 1200 rate filings.

13. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable

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[19] *Cf. United Video Cablevision, Inc.*, CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

[20] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[21] *See* Appendix B.

[22] *See* Appendix A.

[23] *See* 47 C.F.R. § 76.956(a).

[24] *See* Appendix B.

[25] These findings are based solely on the representations of TCI listed in paragraph 5, *supra*, and the modifications described in paragraphs 8 and 9, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[26] We reviewed TCI's Form 1200 rate filings and confirmed that TCI calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

programming service price charged by TCI Cablevision of Greater Michigan, Inc. in the City of Freemont, Michigan, CUID No. MI0510; Township of Sheridan, Michigan, CUID No. MI0644; and the Township of Brooks, Michigan, CUID No. MI1533, and all other complaints in these franchise areas related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

14. IT IS FURTHER ORDERED that the May 31, 1994 motions filed by the local franchising authorities for the City of Freemont, Michigan, CUID No. MI0510 and the Township of Sheridan, Michigan, CUID No. MI0644 ARE GRANTED AND DENIED TO THE EXTENT INDICATED HEREIN.

15. IT IS FURTHER ORDERED that the benchmark filings submitted by TCI Cablevision of Greater Michigan, Inc. with respect to the Township of Sheridan, Michigan, CUID No. MI0644 and the Township of Brooks, Michigan, CUID No. MI1533, for the period beginning with the filing of the first valid complaint in each franchise area (as set forth in Appendix A) and ending on May 14, 1994, justify a maximum price of $10.15 per month (plus franchise fee) for TCI Cablevision of Greater Michigan, Inc.'s cable programming service tier.

16. IT IS FURTHER ORDERED that the benchmark filing submitted by TCI Cablevision of Greater Michigan, Inc. with respect to the City of Freemont, Michigan, CUID No. MI0510, for the period beginning on October 4, 1993 and ending on May 14, 1994, justifies a maximum price of $10.13 per month (plus franchise fee) for TCI Cablevision of Greater Michigan, Inc.'s cable programming service tier.

17. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that TCI Cablevision of Greater Michigan, Inc. shall refund to subscribers in the Township of Sheridan, Michigan, CUID No. MI0644 and the Township of Brooks, Michigan, CUID No. MI1533, that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth in Appendix A)[27] to May 14, 1994, that exceeded $10.15 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

18. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. §76.961, that TCI Cablevision of Greater Michigan, Inc. shall refund to subscribers in the City of Freemont, Michigan, CUID No. MI0510, that portion of the amounts paid for cable programming service for the period from October 4, 1993 to May 14, 1994, that exceeded $10.13 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

19. IT IS FURTHER ORDERED that TCI Cablevision of Greater Michigan, Inc. shall promptly determine the overcharges to CPS subscribers in each franchise area for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amounts so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refunds within 60 days of Commission approval thereof.

20. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that TCI Cablevision of Greater Michigan, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to its franchise areas in the City of Freemont, Michigan, CUID No. MI0510; Township of Sheridan, Michigan, CUID No. MI0644; and the Township of Brooks, Michigan, CUID No. MI1533, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for each franchise area (plus franchise fee).

21. IT IS FURTHER ORDERED that TCI Cablevision of Greater Michigan, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, CPS tier prices that reflect the reductions in the CPS rate determined in this Order for its franchise areas in the City of Freemont, Michigan, CUID No. MI0510; Township of Sheridan, Michigan, CUID No. MI0644; and the Township of Brooks, Michigan, CUID No. MI1533.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
MI0510	10/4/93	9/29/93
MI0644	11/15/93	11/10/93
MI1533	11/23/93	11/17/93

Appendix B

CUID No.	Inflation Adjustment Factor	Maximum Permitted Price
MI0510	1.028	$10.13
MI0644	1.030	$10.15
MI1533	1.030	$10.15

[27] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Meredith Cable	CUID Nos. MN0297, MN0298,
Television	MN0299, MN0300, MN0301,
of North Suburban	MN0302, MN0303, MN0304,
Roseville, Minnesota	MN0305 and MN0306

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Meredith Cable Television of North Suburban ("Meredith") was charging for its cable programming service ("CPS") tier in its Roseville, Minnesota system, CUID Nos. MN0297 *et al.*[1] Meredith has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Meredith's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of- service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark Showing, operators must use the FCC Form 1200 series.[11]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaints in the franchise areas addressed in this Order were completed and served on Meredith and received by the Commission on the dates set forth in Appendix A.[12]

5. Meredith filed its first Form 393 for its North Suburban cable system, headquartered in Roseville, Minnesota, CUID Nos. MN0297 through MN0306, on November 15, 1993. A second Form 393 was filed on March 24, 1994. In the cover letter that accompanied the second Form 393 filing, Meredith explained that the second Form 393 ". . . reflects certain information which came to Meredith's attention during the basic rate review process [and] should be associated with all of the Form 329 Complaints filed to date for the communities regulated by the North Suburban Cable Commission."

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[1] According to Meredith, CUID numbers MN0297 through MN0306 together constitute a single cable system and have the same programming and rates. Facsimile from Seth A. Davidson of Fleischman and Walsh, L.L.P., Attorneys-of-Record for Meredith Cable, to David O. Ward of the FCC (December 21, 1994).

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Meredith has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Meredith implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Meredith's price for the period after May 14, 1994 may be required to reflect the fact that Meredith's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] According to Meredith, the local franchising authority (North Suburban Cable Commission) that has jurisdiction over all of the franchise areas covered by this Order served a consolidated complaint on Meredith "on or about" October 25, 1993. Except with respect to this complaint, Meredith has not complied with 47 C.F.R. § 76.956(a), which requires Meredith to state when the complaints were served upon it. Under these circumstances, we will consider the mailing dates indicated by the complainants as the service dates of all complaints other than the local franchising authority's complaint.

III. DISCUSSION

6. Meredith asserts that its monthly CPS price of $13.24 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $13.28, as calculated in it most recent filing, dated March 24, 1994. However, upon review, we have determined that Meredith has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Meredith's calculations in Form 393:

a. In order to properly unbundle equipment and installation costs on Form 393, Part II, Worksheet 3, those costs must be expressed at the level of organization at which Form 393 is filed. Where a cable operator records its equipment and installation costs at a higher level of organization, the Commission's regulations permit the operator to assign these costs *pro rata*, using a reasonable allocation method such as the number of subscribers in the franchise area as a percentage of the total.[13] In allocating its costs on Form 393, Part III, Step G, Line 33, Meredith used an incorrect subscriber count which yielded an incorrect figure for Monthly Equipment and Installation Cost. Based upon the numbers provided by Meredith, the correct allocation percentage is 22,308 subscribers for the system divided by the total subscriber count of 103,637, which is 21.53% of the total equipment and installation costs. Accordingly, we will correct Meredith's monthly equipment and installation cost on Form 393, Part III, Step G, Line 34 from $53,885 to $54,658.

b. Meredith's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Instead of entering its current monthly equipment revenue figure, Meredith entered a figure based on its prior equipment rates. This observation is confirmed by the fact that Meredith's Worksheet 2, Line 204 entry is the same as its Worksheet 1, Line 104 entry. As a result, Meredith's Line 104 entry must be revised to reflect its current monthly equipment revenue. Since Meredith restructured its rates, including its equipment rates, on September 1, 1993 in an attempt to comply with the Commission's regulations, the monthly equipment cost figure it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 revenue entry.[14] Accordingly, on Line 104 we enter $54,658 instead of $84,872.

7. Because of these errors, we conclude that Meredith has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its amended Form 393 Meredith apparently calculated the Inflation Adjustment Factor using data it relied on when it set its $13.24 CPS price. If based on this data Form 393 indicated that Meredith's prices were reasonable, then Meredith would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[15] However, Meredith has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data available for the date that Meredith timely filed FCC Form 393.[16] On July 29, 1994, the U.S. Department of Commerce released corrected data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures we calculate an Inflation Adjustment Factor through October 1993, the month preceding Meredith's November 15, 1993 filing,[17] of 1.030.

8. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $13.28, as calculated by Meredith, to $13.05.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Meredith's showing supports a maximum reasonable CPS tier price of $13.05 per month (plus franchise fee) for the period that begins with the date the Commission received the first complete and timely CPS complaint for each franchise area, as listed in Appendix A, to May 14, 1994.[18]

10. We further conclude that Meredith must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Meredith's price during the earlier period was unreasonable.[19] We reserve the right to make further adjustments to Meredith's price for the period after May 14, 1994, upon completion of our review of Meredith's FCC Form 1200 rate filing.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced in Appendix A against the cable programming service price charged by Meredith Cable Television of North Suburban, headquartered in Roseville, Minnesota, CUID Nos. MN0297 through MN0306, and all

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[13] *See* FCC Form 393, page 29, instructions for Line 33.

[14] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations... operator will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[15] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[16] *See* 47 C.F.R. §76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[17] The Inflation Adjustment Factor is calculated using the number of whole months between September 30, 1992, and the date of filing. *See* FCC Form 393, page 11, instructions for Line 104.

[18] This finding is based solely on the representations of Meredith listed in paragraph 5, *supra*, and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[19] We reviewed Meredith's Form 1200 rate filing and confirmed that Meredith calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

other complaints in these franchise areas relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Meredith Cable Television of North Suburban, headquartered in Roseville, Minnesota, CUID Nos. MN0297 through MN0306, for the period beginning with the receipt by the Commission of a complete and timely complaint for each franchise area covered by this order (see Appendix A) and ending on May 14, 1994, justifies a maximum price of $13.05 per month (plus franchise fee) for Meredith's cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Meredith Cable Television of North Suburban shall refund to subscribers that portion of the amounts paid for cable programming service for each franchise area, from the dates the first complaints were received by the Commission as listed in Appendix A[20] to May 14, 1994, that exceeded $13.05 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED that Meredith Cable Television of North Suburban shall promptly determine the overcharges to CPS subscribers for the same period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Meredith Cable Television of North Suburban shall, within 30 days of the release of this Order, revise its Form 1200 filing for CUID Nos. MN0297 through MN0306 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

16. IT IS FURTHER ORDERED that Meredith Cable Television of North Suburban shall place into effect, within 30 days after submission of the revised Form 1200 filing required above, a CPS tier price for CUID Nos. MN0297 through MN0306 that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

APPENDIX A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served on Meredith
MN0297	10/25/93	10/25/93
MN0298	10/25/93	10/25/93
MN0299	10/25/93	10/25/93
MN0300	10/18/93	10/12/93
MN0301	10/25/93	10/25/93
MN0302	10/25/93	10/25/93
MN0303	10/25/93	10/25/93
MN0304	10/07/93	10/12/93
MN0305	10/25/93	10/25/93
MN0306	10/20/93	10/16/93

[20] Our jurisdiction to order a refund dates from the earliest date a complete and timely complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Meredith Cable Television of Burnsville/Eagan Eagan, Minnesota — CUID Nos. MN0439, MN0440

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Meredith Cable Television of Burnsville/Eagan ("Meredith") was charging for its cable programming service ("CPS") tier in Burnsville/Eagan, Minnesota, CUID Nos. MN0439 and MN0440.[1] Meredith has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Meredith's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

II. PROCEDURAL MATTERS

4. A single complete and timely CPS complaint for each of the two franchise areas addressed in this Order was completed and served on Meredith by the consolidated franchising authority on or about October 14, 1993.[12] The Commission received the complaint on October 20, 1993.

5. Meredith filed its first FCC Form 393 for its Burnsville/Eagan cable system, headquartered in Eagan, Minnesota, CUID Nos. MN0439 and MN0440, with the Commission on November 16, 1993. Meredith filed a revised Form 393 on March 24, 1994, stating that the revision contained certain information that came to its attention during the basic rate review process. Meredith supplemented its justification on December 21, 1994 in response to an inquiry by the Commission staff.[13]

III. DISCUSSION

6. Meredith asserts that its monthly CPS tier price of $14.09 is justified by its benchmark filing because its price is less than the maximum permitted charge of $14.14 as calculated in the filing. However, upon review we have determined that Meredith has not correctly calculated its

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[1] According to Meredith, CUID numbers MN0439 and MN0440 together constitute a single cable system and have the same programming and rates. Basic service rates in these CUIDs are regulated by a single, consolidated franchising authority called the Burnsville/Eagan Communications Commission of Burnsville, Minnesota. Facsimile from Seth A. Davidson, Esq. of Fleischman and Walsh, L.L.P., Attorneys-of-Record for Meredith Cable, to David O. Ward, Esq. of the FCC (December 21, 1994).

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Meredith has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Meredith implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Meredith's price for the period after May 14, 1994 may be required to reflect the fact that Meredith's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] Meredith stated in its cover letter of March 24, 1994 that it was served with its first valid Form 329 Complaint on or about October 14, 1993.

[13] Facsimile from Seth A. Davidson, *supra*.

maximum permitted price, and it is therefore appropriate to make the following adjustments to Meredith's calculations in Form 393:

a. In order to properly unbundle equipment and installation costs on Form 393, Part II, Worksheet 3, those costs must be expressed at the level of organization at which Form 393 is filed. Where a cable operator records its equipment and installation costs at a higher level of organization, the Commission's regulations permit the operator to assign these costs *pro rata*, using a reasonable allocation method such as the number of subscribers in the franchise area as a percentage of the total.[14] In allocating its costs on Form 393, Part III, Step G, Line 33, Meredith used an incorrect subscriber count which yielded an incorrect figure for Monthly Equipment and Installation Cost. Based upon the numbers provided by Meredith, the correct allocation percentage is 23,351 subscribers for the system divided by the total subscriber count of 103,637, which is 22.53% of the total equipment and installation costs. Accordingly, we will correct Meredith's monthly equipment and installation cost on Form 393, Part III, Step G, Line 34 from $54,431 to $55,732.

b. Meredith's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Instead of entering its current monthly equipment revenue, Meredith entered a figure based on its prior equipment rates. This observation is confirmed by the fact that Meredith's Worksheet 2, Line 204 entry is the same as its Worksheet 1, Line 104 entry. Meredith's Line 104 entry must be revised to reflect its current monthly equipment revenue. Since Meredith restructured its rates, including its equipment rates, on September 1, 1993 in an attempt to comply with the Commission's regulations, the monthly equipment cost figure it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 entry.[15] Accordingly, on Line 104 we enter $55,732 instead of $91,673.

7. Because of these errors, we conclude that Meredith has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet I. On its amended Form 393, Meredith apparently calculated the Inflation Adjustment Factor using data it relied on when it set its $14.09 CPS price. If based on this data Form 393 indicated that Meredith's prices were reasonable, then Meredith would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[16] However, Meredith has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data available for the date that Meredith timely filed FCC Form 393.[17] On July 29, 1994, the U.S. Department of Commerce released corrected data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the month preceding Meredith's November 16, 1993 filing,[18] of 1.030.

8. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $14.14, as calculated by Meredith, to $13.97.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Meredith's showing supports a maximum reasonable CPS tier price of $13.97 per month (plus franchise fee) for the period October 20, 1993 to May 14, 1994.[19] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. We further conclude that Meredith must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Meredith's price during the earlier period was unreasonable.[20] We reserve the right to make further adjustments to Meredith's price for the period after May 14, 1994, upon completion of our review of Meredith's FCC Form 1200 rate filing.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 14, 1993 complaint against the cable programming service price charged by Meredith Cable Television in Burnsville and Eagan, Minnesota, CUID Nos. MN0439 and MN0440, IS GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Meredith Cable Television of Burnsville and Eagan, Minnesota, with respect to CUID Nos. MN0439 and MN0440 for the period October 20, 1993 to May 14,

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[14] *See* FCC Form 393, page 29, instructions for Line 33.

[15] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[16] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[17] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[18] The Inflation Adjustment Factor is calculated using the number of whole months between September 30, 1992, and the date of filing. *See* FCC Form 393, page 11, instructions for Line 104.

[19] This finding is based solely on the representations of Meredith listed in paragraph 5, s *upra*, and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[20] We reviewed Meredith's Form 1200 rate filing and confirmed that Meredith calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

1994, justifies a maximum price of $13.97 per month (plus franchise fee) for Meredith Cable Television of Burnsville/Eagan's cable programming service tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Meredith Cable Television of Burnsville/Eagan shall refund to subscribers that portion of the amounts paid for cable programming service from October 20, 1993[21] to May 14, 1994, that exceeded $13.97 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED that Meredith Cable Television of Burnsville/Eagan shall promptly determine the overcharges to CPS subscribers for the same period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Meredith Cable Television of Burnsville/Eagan shall, within 30 days of the release of this Order, revise its Form 1200 filing for CUID Nos. MN0439 and MN0440, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

16. IT IS FURTHER ORDERED that Meredith Cable Television of Burnsville/Eagan shall place into effect, within 30 days after submission of the revised Form 1200 filing required above, a CPS tier price for CUID Nos. MN0439 and MN0440 that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[21] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID Nos. CT0005, CT0007, CT0009, CT0010, CT0011

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in the following communities in Connecticut: Prospect, CUID No. CT0005; Wolcott, CUID No. CT0007; Waterbury, CUID No. CT0009; Middlebury, CUID No. CT0010; and Plymouth, CUID No. CT0011. Sammons has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. A single complaint was filed by the State of Connecticut for all five communities. The complaint was served on Sammons before September 1, 1993.[11] The Commission received the complaint on September 2, 1993.

5. Sammons attempted to justify its CPS price through an FCC Form 393 filed on October 5, 1993 in response to the complaint. Sammons amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[12] and on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[13]

III. DISCUSSION

6. In its amended benchmark filing of June 24, 1994, Sammons calculated a maximum permitted rate for the CPS tier of $8.28 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Sammons' price for the period after May 14, 1994 may be required to reflect the fact that Sammons' price during theearlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was dated August 31, 1993 and states that it was mailed to Sammons on that date. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider September 1, 1993, the date when the Commission's regulations became effective, as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

CPS tier was $8.36 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showing supports a maximum reasonable CPS tier price of $8.28 per month (plus franchise fee) for the period September 2, 1993 to May 14, 1994.[14] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. We further conclude that Sammons must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Sammons' price during the earlier period was unreasonable.[15] We reserve the right to make further adjustments to Sammons' price for the period after May 14, 1994, upon completion of our review of Sammons' FCC Form 1200 rate filing.

9. We further conclude that Sammons has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[16] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the August 31, 1993 complaint against the cable programming service price charged by Sammons Communications, Inc. in Prospect, Connecticut, CUID No. CT0005; Wolcott, Connecticut, CUID No. CT0007; Waterbury, Connecticut, CUID No. CT0009; Middlebury, Connecticut, CUID No. CT0010; and Plymouth, Connecticut, CUID No. CT0011, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Sammons Communications, Inc. with respect to Prospect, Connecticut, CUID No. CT0005; Wolcott, Connecticut, CUID No. CT0007; Waterbury, Connecticut, CUID No. CT0009; Middlebury, Connecticut, CUID No. CT0010; and Plymouth, Connecticut, CUID No. CT0011, for the period of September 2, 1993 to May 14, 1994, justifies a maximum price of $8.28 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Sammons Communications, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from September 2, 1993[17] to May 14, 1994, that exceeded $8.28 per month (plus franchise fee) and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Sammons Communications, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Prospect, Connecticut, CUID No. CT0005; Wolcott, Connecticut, CUID No. CT0007; Waterbury, Connecticut, CUID No. CT0009; Middlebury, Connecticut, CUID No. CT0010; and Plymouth, Connecticut, CUID No. CT0011, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for Prospect, Connecticut, CUID No. CT0005; Wolcott, Connecticut, CUID No. CT0007; Waterbury, Connecticut, CUID No. CT0009; Middlebury, Connecticut, CUID No. CT0010; and Plymouth, Connecticut, CUID No. CT0011, that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[14] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] We reviewed Sammons' Form 1200 rate filing and confirmed that Sammons calculated its rates for the period after May 14, 1994 using a rate that we find in this Order to be unreasonable.

[16] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jones Spacelink, Ltd., Hawaii	HI0022, HI0040, HI0079
Jones Intercable, Inc. Blue Springs and Independence, Missouri Jones Intercable Investors, L.P.	MO0108, MO0154, MO0196
Jones Intercable, Inc. Charles County, Maryland	MD0033
Jones Intercable, Inc. Olathe, Kansas Jones Intercable Investors, L.P.	KS0261
Jones Intercable, Inc. New Jersey Cable TV Fund 14-A, Ltd.	NJ0452, NJ0462, NJ0466, NJ0477 NJ0579, NJ0580, NJ0581
Jones Intercable, Inc. South Carolina Jones Cable Income Fund 1-B, Ltd.	SC0019, SC0381

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the prices Jones Spacelink, Ltd. and Jones Intercable, Inc., and their subsidiaries, (collectively "Jones") were charging for their cable programming service ("CPS") tier in several locations as captioned above. Jones has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Jones' prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices. [3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of- service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Jones asserts that its monthly CPS prices are justified by its benchmark filings because these prices are less than the maximum permitted charges. Upon review, we have found no apparent errors that would require a recalculation of Jones' maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Jones Spaceklink, Ltd. and Jones Intercable, Inc., and their subsidiaries, as indicated in the caption, ARE DENIED TO THE EXTENT INDICATED HEREIN.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Jones has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Jones implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Jones. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

6. IT IS FURTHER ORDERED that the benchmark filing submitted by Jones Spacelink, Ltd. and Jones Intercable, Inc., and their subsidiaries as indicated in the caption, justify the prices charged for the cable programming service tier for the period from September 1, 1993 to May 14, 1994 of $12.78 (plus franchise fee) in Hawaii, CUID Nos. HI0022, and HI0040; $8.45 (plus franchise fee) in Hawaii, CUID No. HI0079; $13.68 (plus franchise fee) in Blue Springs and Independence, Missouri, CUID Nos. MO0108, MO0154 and MO0196; $13.09 (plus franchise fee) in Charles County, Maryland, CUID No. MD0033; $13.68 (plus franchise fee) in Olathe, Kansas, CUID No. KS0261; $11.07 (plus franchise fee) in New Jersey, CUID Nos. NJ0452, NJ0462, NJ0466, NJ0477, NJ0579, NJ0580 and NJ0581; $10.93 (plus franchise fee) in South Carolina, CUID No. SC0019; and $10.91 (plus franchise fee) in South Carolina, CUID No. SC0381.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Telecable, Inc. of:	CUID Nos. AL0064, GA0063,
Lee County, Alabama	IN0069 KS0064, KS0092,
Columbus, Georgia	KY0396, TX0826, TX1255,
Kokomo, Indiana	TX1228
Overland Park, Kansas	
Radcliff, Kentucky	
Arlington, Texas and	
Plano/Richardson, Texas	

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 23, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Telecable of Lee County, Alabama, Inc., CUID No. AL0064; Telecable of Columbus, Georgia, Inc., CUID No. GA0063; Telecable of Kokomo, Indiana, Inc., CUID No. IN0069; Telecable of Overland Park, Kansas, Inc., CUID Nos. KS0064 and KS0092; Telecable of Radcliff, Kentucky, Inc., CUID No. KY0396; Telecable of Arlington, Texas Inc. CUID No. TX0826; and Telecable of Plano/Richardson, Texas, Inc., CUID Nos. TX1255 and TX1228 (collectively "Telecable") were charging for their cable programming service ("CPS") tiers. Telecable has chosen to attempt to justify its prices through benchmark showings on FCC Forms 393. This Order addresses the reasonableness of Telecable's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of- service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaints in the franchise areas addressed in this Order were completed and served on Telecable and received by the Commission on the dates set forth in Appendix A.[11]

5. Telecable initially filed Forms 393 for the franchise areas addressed in this Order on the dates set forth in Appendix B. Telecable filed amended Forms 393 for all franchise areas covered by this Order on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12]

III. DISCUSSION

6. Telecable asserts that its monthly CPS prices for each franchise area covered by this Order are justified because they are equal to or less than the maximum permitted charges as calculated in each franchise area's most recent Form 393 filing. These assertions are set forth in Appendix C. Upon review, we have found no apparent errors that

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Telecable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Telecable implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b) at 4119.

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] Telecable has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider the mailing dates supplied by the complainants to be the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

would require recalculations of Telecable's maximum permitted CPS prices for the franchise areas covered by this Order.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Telecable has demonstrated that its actual prices charged in each of the franchise areas covered by this Order, plus franchise fee, as set forth in Appendix C, were reasonable CPS tier prices for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[13]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Telecable of Lee County, Alabama, Inc., CUID No. AL0064; Telecable of Columbus, Georgia, Inc., CUID No. GA0063; Telecable of Kokomo, Indiana, Inc., CUID No. IN0069; Telecable of Overland Park, Kansas, Inc., CUID Nos. KS0064 and KS0092; Telecable of Radcliff, Kentucky, Inc., CUID No. KY0396; Telecable of Arlington, Texas, Inc. CUID No. TX0826; and Telecable of Plano/Richardson, Texas, Inc., CUID Nos. TX1255 and TX1228, and all other complaints relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filings submitted by Telecable of Lee County, Alabama, Inc., CUID No. AL0064; Telecable of Columbus, Georgia, Inc., CUID No. GA0063; Telecable of Kokomo, Indiana, Inc., CUID No. IN0069; Telecable of Overland Park, Kansas, Inc., CUID Nos. KS0064 and KS0092; Telecable of Radcliff, Kentucky, Inc., CUID No. KY0396; Telecable of Arlington, Texas Inc. CUID No. TX0826; and Telecable of Plano/Richardson, Texas, Inc., CUID Nos. TX1255 and TX1228, justify the monthly prices for the cable programming service tier in each franchise area set forth in Appendix C (plus franchise fee) for the period beginning with the filing of the first complete and timely complaint in each franchise area (as set forth on Appendix A) and ending on May 14, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

APPENDIX A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
AL0064	01/25/94	01/19/94
GA0063	02/15/94	02/03/94
IN0069	02/10/94	02/07/94
KS0064	02/28/94	02/21/94
KS0092	03/01/94	02/25/94
KY0396	02/24/94	02/24/94
TX0826	10/28/93	10/22/93
TX1228	11/22/93	11/16/93
TX1255	10/12/93	10/05/93

APPENDIX B

CUID No.	Date First Form 393 Filed	Date Amended Form 393 Filed
AL0064	11/26/93	06/24/94
GA0063	12/10/93	06/24/94
IN0069	11/23/94	06/24/94
KS0064	11/15/93	06/24/94
KS0092	11/15/93	06/24/94
KY0396	03/24/94	06/24/94
TX0826	11/15/93	06/24/94
TX1228	11/15/93	06/24/94
TX1255	11/15/93	06/24/94

APPENDIX C

CUID No.	Actual Rates	Maximum Reasonable Rates
AL0064	$8.86	$8.88
GA0063	$7.53	$7.56
IN0069	$9.19	$9.20
KS0064	$6.48	$6.50
KS0092	$6.48	$6.50
KY0396	$6.51	$6.52
TX0826	$6.19	$6.19
TX1228	$11.37	$11.37
TX1255	$11.37	$11.37

[13] This finding is based solely on the representations of Telecable listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID No. TX0761
Lake Worth, Texas

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in Lake Worth, Texas, CUID No. TX0761. Sammons has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint was served on Sammons on January 17, 1994.[11] The Commission received the complaint on January 21, 1994.

5. Sammons attempted to justify its CPS price through an FCC Form 393 filed on February 25, 1994 in response to the complaint. Sammons amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12] On December 27, 1994, Sammons responded to a Commission letter, which requested further clarification of Sammons' showing.[13] Sammons also submitted information on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[14]

III. DISCUSSION

6. In its amended benchmark filing of June 24, 1994, Sammons calculated a maximum permitted rate for the CPS tier of $7.85 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Sammons' price for the period after May 14, 1994 may be required to reflect the fact that Sammons' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint states that it was mailed to Sammons on January 17, 1994. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider January 17, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] Letter from Julia Buchanan, FCC, to Cody Colquitt, Sammons Communications, Inc. (December 20, 1994).

[14] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its CPS tier was $8.00 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showing supports a maximum reasonable CPS tier price of $7.85 per month (plus franchise fee) for the period January 21, 1994 to May 8-14, 1994.[15] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. We further conclude that Sammons must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Sammons' price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to Sammons' price for the period after May 14, 1994, upon completion of our review of Sammons' FCC Form 1200 rate filing.

9. We further conclude that Sammons has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 17, 1994 complaint against the cable programming service price charged by Sammons Communications, Inc. in Lake Worth, Texas, CUID No. TX0761, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Sammons Communications, Inc. with respect to Lake Worth, Texas, CUID No. TX0761, for the period of January 21, 1994 to May 14, 1994, justifies a maximum price of $7.85 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Sammons Communications, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from January 21, 1994[18] to May 14, 1994, that exceeded $7.85 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Sammons Communications, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its Lake Worth, Texas franchise area, CUID No. TX0761, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Lake Worth, Texas franchise area, CUID No. TX0761, that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to hhthis proceeding not specifically addressed herein.

[16] We reviewed Sammons' Form 1200 rate filing and confirmed that Sammons calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID No. TX0576
Haltom City, Texas

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in Haltom City, Texas, CUID No. TX0576. Sammons has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint was served on Sammons on January 17, 1994.[11] The Commission received the complaint on January 21, 1994.

5. Sammons attempted to justify its CPS price through an FCC Form 393 filed on February 25, 1994 in response to the complaint. Sammons amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12] On December 27, 1994, Sammons responded to a Commission letter, which requested further clarification of Sammons' showing.[13] Sammons also submitted information on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[14]

III. DISCUSSION

6. In its amended benchmark filing of June 24, 1994, Sammons calculated a maximum permitted rate for the CPS tier of $7.85 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*. Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in Sammons' price for the period after May 14, 1994 may be required to reflect the fact that Sammons' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint states that it was mailed to Sammons on January 17, 1994. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider January 17, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[13] Letter from Julia Buchanan, FCC, to Cody Colquitt, Sammons Communications, Inc. (December 20, 1994).

[14] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its CPS tier was $8.00 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showing supports a maximum reasonable CPS tier price of $7.85 per month (plus franchise fee) for the period January 21, 1994 to May 8 14, 1994.[15] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

8. We further conclude that Sammons must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that Sammons' price during the earlier period was unreasonable.[16] We reserve the right to make further adjustments to Sammons' price for the period after May 14, 1994, upon completion of our review of Sammons' FCC Form 1200 rate filing.

9. We further conclude that Sammons has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[17] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 17, 1994 complaint against the cable programming service price charged by Sammons Communications, Inc. in Haltom City, Texas, CUID No. TX0576, IS GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Sammons Communications, Inc. with respect to Haltom City, Texas, CUID No. TX0576, for the period of January 21, 1994 to May 14, 1994, justifies a maximum price of $7.85 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Sammons Communications, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service from January 21, 1994[18] to May 14, 1994, that exceeded $7.85 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Sammons Communications, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to its Haltom City, Texas franchise area, CUID No. TX0576, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that Sammons Communications, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price for its Haltom City, Texas franchise area, CUID No. TX0576, that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to hhthis proceeding not specifically addressed herein.

[16] We reviewed Sammons' Form 1200 rate filing and confirmed that Sammons calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[17] *Public Notice: Cable Services Bureau Announces Optional Procedures with hhRespect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[18] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable Puget North/Central, Washington Salem, Oregon Systems	CUID Nos. WA0013, WA0026, WA0076, WA0091, WA0149, WA0151, WA0191, WA0223, WA0243, WA0245, WA0255, WA0264, WA0310, WA0325, WA0330, WA0396, WA0549, OR0057, OR0194, OR0195, OR0227, OR0423

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Viacom Cable was charging for its cable programming service ("CPS") tier in the communities designated by the CUID numbers referenced above on its Puget North/Central, Washington and Salem, Oregon Systems. Viacom has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Viacom's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas which are the subject of this Order were completed and served on Viacom and received by the Commission on the dates set forth on Appendix A.

5. Viacom filed its first FCC Form 393 for each of the franchise areas addressed in this Order prior to June 27, 1994. On June 27, 1994, Viacom filed amended FCC Forms 393 for all areas, in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11] Viacom subsequently filed further amended Forms 393 on August 15, 1994 for Redmond, Washington, CUID No. WA0151 and Kirkland, Washington, CUID No. WA0310; and on October 20, 1994 for Bellevue, Washington, CUID No. WA0076 and Bellevue-All Points, Washington, CUID No. WA0330. Finally, Viacom submitted additional information for all areas on February 8, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Viacom has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Viacom's prices for the period after May 14, 1994 may be required to reflect the fact that Viacom's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] Id.

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189, n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994) (*"Public Notice"*); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

III. DISCUSSION

6. Viacom asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are lower than or equal to the maximum permitted charges as calculated in the filings. Upon review of Viacom's Form 393 filings, we have found that Viacom has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Viacom's calculations in Form 393:

a. In its February 8, 1995 optional filings, Viacom set forth the total number of regulated channels and the total number of satellite channels based on the standards set forth in the *Public Notice*. Under those standards, a channel must be counted as a regulated channel if, but only if, more than 50% of the time the channel was in operation it was used to provide a service subject to rate regulation.[13] Similarly, in order to count as a satellite channel, a channel must be used for regulated satellite programming more than 50% of the time it is in operation.[14] We have adjusted Viacom's FCC Form 393 filings to reflect the counts of total regulated and satellite channels reported on Viacom's optional filings.

b. In its amended filings of June 27, 1994, Viacom states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its CPS prices. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its prices), and if based on this data Form 393 indicated that its prices were reasonable, then Viacom would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[15] However, the figures Viacom used are not consistent with data on which it should have relied in setting its CPS prices. Specifically, Viacom used data released by the U.S. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used earlier data to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed Adjustment Time Periods extending through various periods in the last quarter of 1993 and the first quarter of 1994 (depending on the filing date of the complaint), which is inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculation of the Inflation Adjustment Factor is thus incorrect.

c. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the latest date contemplated by the Form 393 instructions.[16] On its February 8, 1995 filings in response to the *Public Notice*, Viacom supplied corrected Inflation Adjustment Factors based on the last legal filing date as defined in the *Public Notice*.[17] We have used these Inflation Adjustment Factors to calculate Viacom's maximum permitted rates.

7. Correction of Viacom's errors does not result in a reduction in Viacom's maximum permitted CPS tier prices in CUID Nos. WA0026, WA0091, WA0149, WA0151, WA0243, WA0245, WA0325, WA0396, OR0057, OR0194, OR0195, OR0227, and OR0423. We therefore conclude that Viacom has demonstrated that its prices for the CPS tier in these areas were not unreasonable.[18]

8. We conclude that Viacom has failed to demonstrate that its prices for the CPS tier were not unreasonable in CUID Nos. WA0013, WA0076, WA0191, WA0223, WA0255, WA0264, WA0310, WA0330 and WA0549. We will therefore set prices for this tier in these communities, incorporating the adjustments discussed above. These adjustments have the effect of reducing the maximum permitted monthly CPS tier price for each franchise area to the levels set forth in Appendix B.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Viacom's showing supports the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[19] With respect to CUID Nos. WA0013, WA0076, WA0223, WA0255, WA0310, WA0330, and WA0549, we determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund. With respect to CUID Nos. WA0191 and WA0264, we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

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[13] *See Public Notice* at 2; *Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, at para. 6a-6c (Cab. Serv. Bur. released Nov. 9, 1994).

[14] *Id.*

[15] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration"*).

[16] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." In general, a cable operator must submit a justification for its rates no more than 30 days after service of the earliest valid complaint. 47 C.F.R. § 76.956(a). The Inflation Adjustment Factor therefore must be calculated as if Viacom Cable had filed Form 393 within this 30-day period.

[17] *See Public Notice* at 3-4.

[18] In its optional filing, Viacom states that its actual monthly CPS price in Amity, Oregon, CUID No. OR0423, was $11.60. We find that the rate card submitted by Viacom shows that the actual charge was $11.36, and that the $11.60 charge includes franchise fees. Accordingly, we find that Viacom has justified its actual rate of $11.36.

[19] This finding is based solely on the representations of Viacom listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

10. We further conclude that Viacom must reflect in its FCC Form 1200 rate filings for CUID Nos. WA0013, WA0076, WA0191, WA0223, WA0255, WA0264, WA0310, WA0330 and WA0549 for the period after May 14, 1994 the fact that Viacom's prices during the earlier period were unreasonable.[20] We reserve the right to make further adjustments to Viacom's prices for the period after May 14, 1994, upon completion of our review of Viacom's FCC Form 1200 rates.

11. We further conclude that Viacom has submitted in good faith optional supplemental filings in response to our *Public Notice*. As provided in the *Public Notice*, we will relieve Viacom of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Viacom Cable in the City of Lake Stevens, Washington, CUID No. WA0026; the City of Everett, Washington, CUID No. WA0091; the City of Bothell, Washington, CUID No. WA0149; the City of Redmond, Washington, CUID No. WA0151; Snohomish County, Washington, CUID No. WA0243; the Town of Steilacoom, Washington, CUID No. WA0245; the City of Brier, Washington, CUID No. WA0325; the City of Mill Creek, Washington, CUID No. WA0396; the City of Salem, Oregon, CUID No. OR0057; Polk County, Oregon, CUID No. OR0194; Marion County, Oregon, CUID No. OR0195; the City of Keyzer, Oregon, CUID No. OR0227; and the City of Amity, Oregon, CUID No. OR0423, and all other complaints in these franchise areas relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the complaints referred to in Appendix A against the cable programming service prices charged by Viacom Cable in the City of Oak Harbor, Washington, CUID No. WA0191 and Island County, Washington, CUID No. WA0264, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

14. IT IS FURTHER ORDERED that the complaints referred to in Appendix A against the cable programming service prices charged by Viacom Cable in the City of Mukilteo, Washington, CUID No. WA0013; the City of Bellevue, Washington, CUID No. WA0076; Snohomish County-Everett, Washington, CUID No. WA0223; Snohomish County-Lynnwood, Washington, CUID No. WA0255; the City of Kirkland, Washington, CUID No. WA0310; the City of Bellevue-All Points, Washington, CUID No. WA0330; and the City of Woodenville, Washington, CUID No. WA0549, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

15. IT IS FURTHER ORDERED that the benchmark filings submitted by Viacom Cable justify the maximum reasonable price in each franchise area set forth in Appendix B (plus franchise fee) for Viacom Cable's cable programming service tier.

16. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Viacom Cable shall refund to subscribers in the City of Oak Harbor, Washington, CUID No. WA0191, and Island County, Washington, CUID No. WA0264 that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[21] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

17. IT IS FURTHER ORDERED that Viacom Cable shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

18. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Viacom Cable shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the City of Mukilteo, Washington, CUID No. WA0013; the City of Bellevue, Washington, CUID No. WA0076; the City of Oak Harbor, Washington, CUID No. WA0191; Snohomish County-Everett, Washington, CUID No. WA0223; Snohomish County-Lynnwood, Washington, CUID No. WA0255; Island County, Washington, CUID No. WA0264; the City of Kirkland, Washington, CUID No. WA0310; the City of Bellevue-All Points, Washington, CUID No. WA0330; and the City of Woodenville, Washington, CUID No. WA0549 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).

19. IT IS FURTHER ORDERED that Viacom Cable shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

20. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Viacom Cable shall not be required to obtain advance approval of adjustments to its CPS prices in the franchise areas addressed herein for one year following the release of this Order.

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[20] We reviewed Viacom's FCC Form 1200 rate filings and confirmed that Viacom calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[21] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
WA0013	11/2/93	10/26/93
WA0026	12/3/93	11/17/93
WA0076	12/6/93	11/30/93
WA0091	12/30/93	12/23/93
WA0149	12/29/93	12/22/93
WA0151	2/28/94	2/24/94
WA0191	11/17/93	10/27/93
WA0223	11/29/93	11/19/93
WA0243	12/28/93	12/23/93
WA0245	11/8/93	11/5/93
WA0255	11/29/93	11/23/93
WA0264	11/23/93	10/27/93
WA0310	10/12/93	10/6/93
WA0325	11/29/93	11/22/93
WA0330	12/9/93	12/8/93
WA0396	1/4/94	12/28/93
WA0549	11/15/93	10/31/93
OR0057	11/9/93	11/9/93
OR0194	11/22/93	11/9/93
OR0195	11/22/93	11/9/93
OR0227	11/22/93	11/9/93
OR0423	11/22/93	11/9/93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
WA0013	$10.80	$10.74
WA0026	$10.80	$10.80
WA0076	$10.69	$10.67
WA0091	$10.57	$10.57
WA0149	$10.80	$10.80
WA0151	$10.57	$10.57
WA0191	$13.11	$13.00
WA0223	$10.80	$10.75
WA0243	$10.80	$10.80
WA0245	$12.04	$12.04
WA0255	$10.80	$10.75
WA0264	$12.97	$12.86
WA0310	$10.09	$10.04
WA0325	$10.80	$10.80
WAO330	$10.69	$10.67
WA0396	$10.80	$10.80
WA0549	$10.57	$10.54
OR0057	$11.36	$11.36
OR0194	$11.36	$11.36
0R0195	$11.36	$11.36
OR0227	$11.36	$11.36
OR0423	$11.36	$11.36

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Copley/Colony Harbor Cablevision, Inc.
Area M, Wilmington, California

CUID No. CA1102

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 1995; Released: February 24, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price Copley/Colony Harbor Cablevision, Inc. ("Colony") was charging for its cable programming service ("CPS") tier in Area M, Wilmington, California, CUID No. CA1102. Colony has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Colony's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaint was completed and served on Colony on January 24, 1994. The Commission received the complaint on January 31, 1994.

5. Colony attempted to justify its CPS price through an FCC Form 393 filed on March 16, 1994. Colony amended its justification on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[11] and on January 24, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. In its amended benchmark filing of January 24, 1995, Colony calculated a maximum permitted price for the CPS tier of $6.80 per month. Upon review of Colony's filing, we have found no apparent errors that would require a recalculation of Colony's maximum permitted CPS price. However, Colony's actual price for the CPS tier was $6.86 per month. Thus, Colony has failed to demonstrate that its price for the CPS tier was not unreasonable.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Colony has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Colony implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price for the period ending May 14, 1994 is found to be excessive, a reduction in Colony's price for the period after May 14, 1994 may be required to reflect the fact that Colony's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Colony's showing supports a maximum reasonable CPS tier price of $6.80 per month (plus franchise fee) for the period January 31, 1994 to May 14, 1994.[13] However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

8. We further conclude that Colony must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that Colony's price during the earlier period was unreasonable.[14] We reserve the right to make further adjustments to Colony's price for the period after May 14, 1994 upon completion of our review of Colony's FCC Form 1200 rate filing.

9. We further conclude that Colony has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[15] As provided in the Public Notice, we will relieve Colony of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the January 24, 1994 complaint against the cable programming service price charged by Copley/Colony Harbor Cablevision, Inc. in Area M, Wilmington, California, CUID No. CA1102, and all other complaints in this franchise area relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by Copley/Colony Harbor Cablevision, Inc. with respect to Area M, Wilmington, California, CUID No. CA1102, for the period of January 31, 1994 to May 14, 1994, justifies a maximum price of $6.80 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Copley/Colony Harbor Cablevision, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Area M, Wilmington, California, CUID No. CA1102, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

13. IT IS FURTHER ORDERED that Copley/Colony Harbor Cablevision, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Copley/Colony Harbor Cablevision, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[13] This finding is based solely on the representations of Colony listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[14] We reviewed Colony's FCC Form 1200 rate filing and confirmed that Colony calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[15] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELE-MEDIA COMPANY OF VIRGINIA

Appeals of Denials of Requests for
Confidentiality of the County of
Botetourt, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

1. On February 24, 1994, and March 22, 1994, Tele-Media Company of Virginia ("Tele-Media") filed with the Commission appeals of denials by the County of Botetourt, Virginia ("County"), of Tele-Media's requests to keep confidential the information contained in Tele-Media's FCC Form 393, Cost of Service Showing and supplementary rate justification materials.[1] Tele-Media's submissions were filed to justify Tele-Media's rates for basic cable television service. For the reasons set forth below, we deny Tele-Media's appeals.

2. Tele-Media submitted an FCC Form 393 and Cost of Service Showing to the County on or about January 26, 1994, in response to the County's notification that it was commencing basic cable rate regulation. At the same time, Tele-Media requested that none of the information contained in the rate justification be made routinely available for public inspection. Tele-Media contended that the material was confidential proprietary information, the public release of which may cause Tele-Media substantial competitive harm. On February 16, 1994, the County sent a letter to Tele-Media which, among other things, denied its request to keep the submission confidential.[2] On February 24, 1994, Tele-Media filed an appeal of the County's decision with the Commission. In response to the County's request for further information,[3] Tele-Media provided explanatory materials which supplemented its earlier rate justification and requested that such information also be kept confidential. In a letter dated March 16, 1994, the County again denied the request.[4] On March 22, 1994, Tele-Media filed an appeal of this denial of the County. In both appeals, Tele-Media requests that the Commission review the County's denials of confidentiality. The County opposes the appeals.

3. With respect to requests for confidentiality of rate justification materials filed with the Commission, we have denied such requests where the cable operator has failed to satisfy its burden of demonstrating that disclosure is likely to cause substantial harm to its competitive position.[5] Likewise, in this case, it appears that Tele-Media has made no allegations concerning the likelihood of competitive harm that would result if the materials are made available for public inspection.

4. Furthermore, Section 76.938 of the Commission's rules which governs proceedings of the type that are here involved, provides that with respect to information justified by the franchise authority as required to make a rate determination, public access to proprietary information shall be governed by applicable state or local law.[6] There is no evidence before us that the County has not complied with such state or local laws or with the requirements of Section 76.938.

5. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the appeals of the County's denial of confidentiality for the rate justification materials submitted by Tele-Media Company of Virginia ARE DENIED. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] "FCC Form 393" is the shorthand name for "Determination of Maximum Initial Permitted Rates For Regulated Cable Programming Services and Equipment," the official form used by cable operators to show that regulated rates charged for the basic service and cable programming services tiers at least through May 14, 1994, conform with the FCC's benchmark. A cable operator must file its basic rate justification with its local franchising authority in response to notification that the local franchising authority is certified and is regulating basic service tier rates. Cable operators with existing or proposed rates above their maximum permitted levels must submit a cost-of-service showing sufficient to support a finding that the rates are reasonable. *See generally* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631 (1993). *See also* 47 C.F.R. §§ 76.922 and 76.930 (1994).

[2] *See* Letter to Frank R. Vicente, Senior Vice President of Tele-Media, from Gerald A. Burgess, County Administrator (dated February 16, 1994).

[3] *Id.*

[4] *See* Letter to Steven E. Koval, Vice President of Accounting of Tele-Media, from Gerald A. Burgess, County Administrator (dated March 16, 1994)

[5] *See* TKR Cable Company of Ramapo, 9 FCC Rcd 3346 (1994).

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316 at ¶79 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TKR CABLE OF SOUTHERN KENTUCKY

Appeal of Denial of Request for
Confidentiality of the City of
Bowling Green, Kentucky

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

1. TKR Cable of Southern Kentucky ("TKR") has filed with the Commission an appeal of the denial by the City of Bowling Green, Kentucky ("City"), of TKR's request to keep confidential all of the information contained in TKR's FCC Form 393, which was submitted to the City to justify TKR's rates for basic cable television service.[1] For the reasons set forth below, we deny TKR's appeal.

2. TKR submitted an FCC Form 393 to the City on January 4, 1994, in response to the City's request for its schedule of rates. At the same time, TKR requested that none of the information contained in the rate justification be made routinely available for public inspection. TKR contended that the material was confidential proprietary information, consisting of the details of its revenues, expenses (identified by category), profits and losses. According to TKR, the rate justification information is "substantially identical" to the type of information afforded confidential treatment under Sections 0.457 and 0.459 of the Commission's rules. On January 26, 1994, the City sent a letter to TKR denying its request to keep the entire submission confidential; instead, the City indicated only the first six pages of the Form 393 would be made available for public inspection.[2] TKR requests that the Commission review the City's denial of confidentiality and stay the City's ability to make the information available for public inspection. The City opposes the appeal.

3. With respect to requests for confidentiality of rate justification materials filed with the Commission, we have denied such requests where the cable operator has failed to satisfy its burden of demonstrating that disclosure is likely to cause substantial harm to its competitive position.[3] Likewise, in this case, it appears that TKR has made no allegations concerning the likelihood of competitive harm that would result if the materials are made available for public inspection.

4. Furthermore, Section 76.938 of the Commission's rules which governs proceedings of the type that are here involved, provides that with respect to information justified by the franchise authority as required to make a rate determination, public access to proprietary information shall be governed by applicable state or local law.[4] There is no evidence before us that the City has not complied with such state or local laws or with the requirements of Section 76.938.

5. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the appeal of the City's denial of confidentiality for the rate justification materials submitted by TKR Cable of Southern Kentucky IS DENIED. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] "FCC Form 393" is the shorthand name for "Determination of Maximum Initial Permitted Rates For Regulated Cable Programming Services and Equipment," the official form used by cable operators to show that regulated rates charged for the basic service and cable programming services tiers at least through May 14, 1994, conform with the FCC's benchmark. A cable operator must file an FCC Form 393 with its local franchising authority in response to notification that the local franchising authority is certified and is regulating basic service tier rates. Cable operators also file FCC Form 393 with the FCC in response to a complaint about rates charged for cable programming service tiers. *See generally* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631 (1993). *See also* §§ 47 C.F.R. § 76.922 and 76.930 (1994).

[2] *See* Letter to Mark J. Palchick, Counsel for TKR, from H. Eugene Harmon, Counsel for City (dated Jan. 26, 1994).

[3] *See* TKR Cable Company of Ramapo, 9 FCC Rcd 3346 (1994).

[4] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316 at ¶79 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

King Videocable Company — CUID Nos. WA0172, WA0175, WA0102

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price King Videocable Company ("King") was charging for its cable programming service ("CPS") tier in Ellensburg, Washington, CUID No. WA0102; Kittitas County, Washington, CUID No. WA0175; and Kittitas City, Washington, CUID No. WA0172. King has chosen to attempt to justify its price through a benchmark showing on identical FCC Forms 393. This Order addresses the reasonableness of King's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaints in Ellensburg, Washington, CUID No. WA0102; Kittitas County, Washington, CUID No. WA0175; and Kittitas City, Washington, CUID No. WA0172, were completed and served on King on December 19, 1993 and received by the Commission on December 29, 1993.

5. King attempted to justify its CPS price through identical FCC Forms 393 filed on January 21, 1994. King amended its justifications on June 30, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[11] and on January 24, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. In its amended benchmark filings of January 24, 1995, King calculated a maximum permitted price for the CPS tier of $9.41 per month.[13] Upon review of King's filing, as amended, we have found no apparent errors that would require a recalculation of King's maximum permitted CPS

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent King has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration")* , the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which King implemented its CPS price under the new regulations. *See* para. 3, *infra*.Furthermore, to the extent that the price for the period ending May 14, 1994 is found to be excessive, reductions in King's price for the period after May 14, 1994 may be required to reflect the fact that King's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases* , DA 95-87 (Jan. 20, 1995).

[13] King recalculated its inflation adjustment in its January 24, 1995 amendments in accordance with the principles set out in the Public Notice.

price. However, King's actual price for the CPS tier was $10.16 per month. Thus, King has failed to demonstrate that its price for the CPS tier was not unreasonable.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that King's showing supports a maximum reasonable CPS tier price of $9.41 per month (plus franchise fee) for the period December 29, 1993 to May 14, 1994.[14]

8. We further conclude that King must reflect in its Form 1200 rate filing for the period after May 14, 1994 the fact that King's price during the earlier period was unreasonable.[15] We reserve the right to make further adjustments to King's price for the period after May 14, 1994, upon completion of our review of King's FCC Form 1200 rate filing.

9. We further conclude that King has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[16] As provided in the Public Notice, we will relieve King of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 19, 1993 complaints against the cable programming service price charged by King Videocable Company in Ellensburg, Washington, CUID No. WA0102; Kittitas County, Washington, CUID No. WA0175; and Kittitas City, Washington, CUID No. WA0172, and all other complaints in these franchise areas relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by King Videocable Company with respect to Ellensburg, Washington, CUID No. WA0102; Kittitas County, Washington, CUID No. WA0175; and Kittitas City, Washington, CUID No. WA0172, for the period of December 29, 1993 to May 14, 1994, justifies a maximum price of $9.41 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that King Videocable Company shall refund to subscribers that portion of the amounts paid for cable programming service in each franchise area from December 29, 1993[17] to May 14, 1994, that exceeded $9.41 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that King Videocable Company shall promptly determine the overcharges to CPS subscribers for the same period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that King Videocable Company shall, within 30 days of the release of this Order, revise its Form 1200 filing for CUID Nos. WA0172, WA0175, and WA0102 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for that franchise area (plus franchise fee).

15. IT IS FURTHER ORDERED that King Videocable Company shall place into effect, within 30 days after submission of the revised Form 1200 filing required above, a CPS tier price for CUID Nos. WA0172, WA0175, and WA0102 that reflects the reduction in the CPS rate determined in this Order.

16. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that King Videocable Company shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

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[14] This finding is based solely on the representations of King listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] We reviewed King's Form 1200 rate filing and confirmed that King calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[16] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[17] Our jurisdiction to order a refund dates from the earliest date a complete and timely complaint is filed with the Commission. *See* 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESYSTEMS OF	Cheshire, CT
CONNECTICUT, INC.,	Meriden, CT
d/b/a DIMENSION	Southington, CT
CABLE SERVICES	

Appeal of Local
Rate Order of State of Connecticut
Department of Public Utility Control

ORDER

Adopted: February 23, 1995 **Released: February 24, 1995**

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 9, 1994, Telesystems of Connecticut, Inc., d/b/a Dimension Cable Services ("Dimension"), filed with the Commission a Petition for Review of Rate Order ("Petition") of the State of Connecticut Department of Public Utility Control ("the State").[1] On September 9, 1994, Dimension also filed a Petition for Stay Pending Review of the local rate order. The State did not file an opposition to the stay petition. On November 23, 1994, the Commission granted Dimension's petition which stayed the effectiveness of the local rate order pending the resolution of Dimension's appeal.[2] In its local order, the State established Dimension's rates for basic cable service, equipment, installations and hourly service charges in the Towns of Cheshire, Meriden, and Southington, Connecticut.[3] As part ofthis decision setting the basic tier rates, the State found Dimension's collective or package offering of certain individually offered ("a la carte") channels to be a regulated tier of service, and, therefore, included those channels as regulated channels for purposes of the local order. The State ordered Dimension to make refunds or to credit subscribers for all payments made in excess of the rates set forth in the local order for the period September 1, 1993 to July 14, 1994.[4]

2. In its appeal, Dimension challenges the local order on the grounds that the State's decision to treat the a la carte package as a regulated tier of service is contrary to the objectives of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's a la carte rules. The State responds that it properly applied the Commission's guidelines on a la carte packages and concluded that Dimension's package should be treated as a regulated tier.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve thecase consistent with the Commission's decision on appeal.[8] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[9]

II. DISCUSSION

4. Dimension objects to the State's finding in the local order that the channels comprising the Preferred Dimension package at issue in this appeal (American Movie Classics, Turner Network Television, The Nashville Network and The Discovery Channel) must be included as regulated channels.[10] Dimension questions the authority of the State to make determinations regarding the regulatory status of a la carte packages.[11] Dimension argues that its a

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[1] The State's rate order was dated August 10, 1994 and served on Dimension on August 17, 1994.

[2] *See* Telesystems of Connecticut, 9 FCC Rcd 7209 (1994). Other filings in this proceeding include an Opposition to Petition for Review filed by the State on September 26, 1994 and a Reply to Opposition to Petition for Review filed by Dimension on October 6, 1994.

[3] *See* Petition, Exhibit A, DPUC Review of Basic Cable Rates and Equipment of Dimension Cable Services, Docket No. 93-12-11, dated August 10, 1994.

[4] Under the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[5] 47 C.F.R. § 76.944.

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket No. 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[7] *Id.*

[8] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[9] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration and Fourth Report and Order, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (1994) (*"Second Reconsideration Order"*).

[10] *See* Petition, Exhibit A at 11-12.

[11] Petition at 9, n.20.

la carte package complies with the provisions of the 1992 Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis.[12] Dimension further argues that its a la carte package fully complies with Commission rules for unregulated treatment existing at the time the package was created.[13] In addition, Dimension contends that the 15 guidelines set forth in the *Second Reconsideration Order* do not provide a basis for invalidating the a la carte package.[14] Finally, Dimension argues that if the Commission does determine that refund liability can be imposed, it should permit Dimension to offset this liability by the amount Dimension could have charged if the four channels at issue had remained regulated.[15]

5. The Dimension package at issue was first offered to subscribers on September 1, 1993, when Dimension restructured the service offerings on its system serving the Towns of Cheshire, Meriden, and Southington. Dimension states that its September 1, 1993 restructuring involved offering four channels from its former cable programming service tier on an individual basis and also as a package that Dimension alleges is not subject to rate regulation.[16]

6. The facts presented in this appeal closely resemble the facts presented in one of our recently issued letter of inquiry orders on a la carte packages, *Dimension Cable Services*, Oceanside, California, LOI-93-36, DA 94-1310 (Cab. Serv. Bur., released Nov. 25, 1994), in which we resolved the regulatory status of an la carte package offered by Times Mirror Cable Television of San Diego, Inc. that is essentially the same as the a la carte package at issue in this appeal. Specifically, the Times Mirror a la carte package at issue in the *Dimension Cable Services* order was a four-channel package that was offered as part of a restructuring and was created by moving four channels from the former cable programming service tier. In the *Dimension Cable Services* case, we found we could not say that it was clear that the a la carte package at issue was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that the a la carte package at issue may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) (*"Going Forward Order"*).[17]

7. We find that the State's determination that Dimension's a la carte package is a regulated tier is inconsistent with the action taken in the letter of inquiry orders, and in particular, in *Dimension Cable Services*.[18] We further find that, in accordance with *Dimension Cable Services*, Dimension's a la carte package should not be treated as a rate regulated tier of service. Accordingly, we are remanding this issue to the State so that it can enter an order consistent with our findings in *Dimension Cable Services*.[19]

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the appeal of the local order, with respect to the issue of the regulatory status of Dimension's a la carte package, is REMANDED to the State for resolution in accordance with the terms of this Order.

9. IT IS FURTHER ORDERED that our stay of the local order which was granted pending the resolution of this appeal is hereby VACATED.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

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[12] Petition at 4.

[13] Petition at 7-9; *See Rate Order*, 8 FCC Rcd at 5836-5838; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration and Second Report and Order, MM Docket 92-266, 9 FCC Rcd 1164, 1184 (1993).

[14] Petition at 9-20; *See Second Reconsideration Order*, 9 FCC Rcd at 4214-4216.

[15] Petition at 20-21.

[16] In its Petition, Dimension indicates that after its initial September 1, 1993 restructuring, it began offering a second four-channel a la carte package. However, in this order, we only address the regulatory status of the package that is the subject of this appeal. We note that on September 1, 1993, Dimension was in the process of upgrading its system to provide subscribers with an increased number of channels. After restructuring, Dimension offered customers in the rebuilt area a greater total number of channels than customers in the non-rebuilt area. However, Dimension offered the same four-channel a la carte package at issue in this appeal to subscribers in both the rebuilt and non-rebuilt areas.

[17] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order* at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[18] Dimension's concern that the State may not have the authority to determine the regulatory status of a la carte service offerings is without merit. The State's rate order was dated August 10, 1994 and served August 17, 1994. In the *Second Reconsideration Order*, effective May 15, 1994, the Commission provided that "local authorities may make any necessary 'a la carte' determination as part of their final decision setting rates for the basic tier. *Id.* at 4217. Contrary to Dimension's contention, this provision does not delegate the Commission's jurisdiction over cable programming service tier rates to local authorities. Rather, it allows local authorities to make an initial determination concerning the number of regulated channels that is necessary to accomplish their review of basic service tier rates.

[19] We note that we need not address Dimension's arguments with respect to either the "retroactive" application by the State of the 15 guidelines set forth in the *Second Reconsideration Order* or the offsetting of refunds in light of the fact that we grant Dimension's appeal on the a la carte issue and remand this case to the State so that it may enter an order consistent with our findings in our letter of inquiry orders.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: April 10, 1995

Dorothy D. Park
Personal Representative of the Estate of Roy H. Park
c/o Park Communications, Inc.
Terrace Hill
Ithaca, New York 14850

Park Acquisitions, Inc.
c/o Eckert, Seamans, Cherin & Mellott
One International Place, 18th Floor
Boston, Massachusetts 02110

Applicants:

This refers to the applications for Commission consent to transfer the licenses of 31 television and radio stations and three television translator stations held by subsidiaries of Park Communications, Inc. ("PCI") from Dorothy Park, Personal Representative of the Estate of Roy H. Park to Park Acquisitions, Inc. ("PAI").[1] Because the Grade A contours of televisionstations in Greenville, North Carolina, in Chattanooga, Tennessee, and in Richmond, Virginia, encompass the communities of license of commonly owned AM and FM radio stations, the proposed transfer would violate the one-to-a-market rule, found in Section 73.3555(c) of the Commission's Rules.[2] 47 C.F.R. §73.3555(c) (1994). This rule proscribes common ownership of a television station and radio stations in the same market.[3] Consequently, you have requested a temporary 12-month waiver of the rule in order to give you time to divest yourself of the radio stations in an orderly manner. David Lampel, Atlas News and Information Services, Inc., an unsuccessful minority bidder for the Park stations, and WVGO License Limited Partnership and Benchmark Radio Acquisition Fund III Limited Partnership ("WVGO"), licensee of WVGO-FM, Richmond, Virginia, filed petitions to deny your applications, and you filed responses to these petitions. The Memphis Development Company ("MDC") has also filed an informal objection against your applications. On January 27, 1995, WVGO requested that the Commission allow it to withdraw its petition.[4]

In support of your temporary waiver request, you note that granting your request will not create any new prohibited ownership combinations, and that in similar instances the Commission has granted temporary waivers. You also assert that allowing a 12-month waiver will serve the public interest by permitting the current service provided by the Park stations to continue uninterrupted. Furthermore, you note that a rushed sale of the stations may cause several negative consequences such as unnecessarily limiting the pool of buyers, thereby possibly excluding minorities and potentially decreasing the value of the stations. If granted the temporary waiver, however, you pledge that PAI will undertake an affirmative effort to find minority buyers for the stations.

Additionally, you state that none of the affected markets suffer from a lack of media voices, and therefore granting the waiver will not create an undue economic concentration of media voices. You note that Greenville, North Carolina falls into the Greenville-New Bern-Washington Area of Dominant Influence ("ADI") for television and the North Carolina Metro Survey Area ("MSA") for radio. According to your waiver request, a total of 9 television stations, 43 radio stations, a cable service with 60% penetration in the area and 11 general or community newspapers serve this area. In the Chattanooga, Tennessee ADI and MSA, a total of 8 television stations, 32 radio stations, a cable operator with 63.6% penetration and 10 general or community newspapers exist. Lastly, you note that the Richmond, Virginia ADI and MSA are served by 8 television stations, 34 radio stations, three cable operators with 55.8% penetration and 8 general or community newspa-

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[1] The stations involved in this transfer are: WNCT-TV, WNCT-AM, WNCT-FM, Greenville, NC (BTCCT-941107KJ, BTC-941107KK, BTCH-941107KL); WBMG(TV), Birmingham, AL (BTCCT-941107KM); WSLS-TV, Roanoke, VA (BTCCT-941107KT); WUTR(TV), Utica, NY (BTCCT-941107KW); WDEF-TV, Chattanooga, TN (BTCCT-941107KX); WJHL-TV, Johnson City, TN (BTCCT-941107LA); WTVR-TV, Richmond, VA (BTCCT-941107LD); WTVQ-TV, Lexington, KY (BTCCT-941107LK); KALB-TV, Alexandria, LA (BTCCT-941107LN); KWJJ-AM, KWJJ-FM, Portland, OR (BTC-941107KN, BTCH-941107KO); KJJO-AM, KJJO-FM, St. Louis Park, MN (BTC-941107KP, BTCH-941107KQ); WNAX-AM, WNAX-FM, Yankton, SD (BTC-941107KR, BTCH-941107KS); WHEN-AM, WHEN-FM, Syracuse, NY (BTC-941107KU, BTCH-941107KV); WDEF-AM, WDEF-FM, Chattanooga, TN (BTC-941107KY, BTCH-941107KZ); WTVR-AM, WTVR-FM, Richmond, VA (BTC-941107LB, BTCH-941107LC); KEZX-AM, KEZX-FM, Seattle, WA (BTC-941107LF, BTCH-941107LE); WPAT-AM, WPAT-FM, Paterson, NJ (BTC-941107LG, BTCH-941107LH); KWLO-AM, KFMW-FM, Waterloo, IA (BTC-941107LI, BTCH-941107LJ); WNLS-AM, WTNT-FM, Tallahassee, FLh)(BTC-941107LL, BTCH-941107LM); and three TV translators: WO5BI, Morehead City, NC (BTCTTV-941107LO); W04CB, Sylacauga, AL (BTCTVL-941107LQ); and W63AE, Oneonta, NY (BTCTT-941107LP).

[2] The stations involved are: Greenville, North Carolina (WNCT-TV, WNCT-AM, WNCT-FM); Chattanooga, Tennessee (WDEF-TV, WDEF-AM, WDEF-FM); and Richmond, Virginia (WTVR-TV, WTVR-AM, WTVR-FM).

[3] PCI currently holds these stations pursuant to the grandfathering provisions of Section 73.3555, Note 4. *See* 47 C.F.R. §73.3555, n.4.

[4] The WVGO principals certified that they did not, and will not, receive any money or other consideration for the withdrawal of their petition. 47 C.F.R. §73.3588. Regardless of this request for permission to withdraw, however, once a petition to deny is filed we are obligated to consider its merits. *Viacom Inc.*, 9 FCC Rcd 1577, 1577 (1994); *Booth American Co.*, 58 F.C.C. 2d 553, 554 (1976). To the extent that the issues raised by Mr. Lampel and MDC are similar to those raised by WVGO, however, they will be discussed below. We have reviewed the remaining WVGO allegations and find that they do not raise a substantial and material question as to whether approval of the transfer would serve the public interest, convenience and necessity.

pers. Finally, you assert that permitting existing grandfathered combinations to continue for an additional 12-month period in order to allow an orderly divestiture poses no threat to diversity or to economic competition in the affected markets.

The ultimate objectives of the Commission's multiple ownership rules are to promote economic competition and diversity of programming and viewpoints in order to further the public interest. *See Amendment of Section 73.3555 of the Commission's Rules*, 4 FCC Rcd 1723 (1989), *recon. granted in part and denied in part*, 4 FCC Rcd 6489 (1989); *Attribution of Ownership Interests*, 97 F.C.C. 2d 997 (1984), *recon. granted in part and denied in part*, 1 FCC Rcd 802 (1986). The Commission is not, however, without flexibility to respond to situations where application of fixed multiple ownership standards would be contrary to other public interest concerns. Before we will grant such a waiver, an applicant must sustain the burden of showing that the benefits to be achieved by its proposal are in the public interest and that a waiver would not compromise the fundamental policies served by the rule.

On the basis of the representations before us and the circumstances of this case, we find that a temporary waiver would be consistent with the public interest and with our previous decisions. In the past we have held that forcing an immediate sale for diversity purposes alone would not be in the public interest where the result of such an action may be to unnecessarily restrict the value of the station, *Knoxville Channel 8 Limited Partnership*, 4 FCC Rcd 4760, 4761 (1989), or to limit the range of potential buyers to those with immediate access to the necessary capital, thereby possibly precluding purchase by local groups or minority-controlled entities. *Citadel Communications Company, Ltd.*, 5 FCC Rcd 3842, 3844 (1990). In addition, in view of the numerous other media services available and the longstanding grandfathered common ownership of the stations involved, we find that no undue concentration of control of the media or adverse effect on diversity will result from a grant of this temporary request.

We turn next to the allegations raised in the filings by Mr. Lampel regarding the transferor and its investment adviser, and by the MDC regarding the transferee's funding source. According to information supplied in the pleadings, it appears that the sale of PCI occurred by means of a formal auction process, conducted with the assistance of an investment adviser. As part of this process, the investment adviser required that any entity interested in bidding on PCI demonstrate that it had the financial resources available to consummate the transaction. Entities who did this were then asked to enter a confidentiality agreement for the purpose of receiving a confidential memorandum regarding PCI's finances for use in making a preliminary bid. The leading bidders then had until October 17, 1994 to submit a final bid.

In his objection,[5] Mr. Lampel asserts that the investment adviser placed him at a disadvantage compared with other bidders by denying him the financial information on PCI. Additionally, he claims that the investment adviser tried to "pre-qualify" him, thus making it more difficult for him to attempt to purchase the stations. He further argues that the investment adviser's actions denied him both procedural and substantive due process because, he alleges, a similarly situated non-minority bidder would not have been treated in the same manner. In his reply, he also suggests that since the Securities and Exchange Commission has found the investment adviser in violation of the Exchange Act in matters entirely unrelated to its dealings with PCI, the investment adviser should not be entrusted with aiding in the PCI transaction. He also urges us to impute the investment adviser's alleged misdeeds to the transferor. Furthermore, he notes that a limited partner in the investment advising firm also serves on the board of directors of PCI and, as such, has an undisclosed cognizable interest in the company which, he insinuates, poses a conflict of interest. Lastly, he asserts that by using the assistance of an investment adviser PCI improperly delegated to a non-licensee decisions regarding appropriate bidders. For the reasons stated above, Mr. Lampel requests that the Commission declare the agreement null and void and give him, as a minority bidder and, by his assertion, a more experienced broadcaster, an equal chance to acquire the stations. In his reply, Mr. Lampel also requests that we conduct a hearing to further investigate his claims.

Initially, we note that throughout Mr. Lampel's arguments runs the general implication that the public interest may better be served if he were to purchase PCI rather than PAI. In making our determination regarding approval of an application for transfer of control, however, Section 310(d) of the Communications Act limits our consideration to the transferee proposed in this application. Under the Act, "the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer . . . to a person other than the proposed transferee . . . ." 47 U.S.C. §310(d). Since we cannot consider whether another buyer, such as Mr. Lampel, might comparatively better serve the public interest, his suggestion to this effect does not establish the need for a hearing. *See Citadel Communications Company, Ltd.*, 5 FCC Rcd at 3844.

Section 309(d)(1) of the Communications Act requires that a petition to deny contain specific allegations of fact, supported by an affidavit of someone with personal knowledge thereof, sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact requiring resolution in a hearing. 47 U.S.C. §309 (d)(1)-(2). Although Mr. Lampel noted that

[5] In his filing, Mr. Lampel failed to meet both our procedural and our substantive standing requirements. In his original filing, Mr. Lampel did not support his allegations with an affidavit of someone with personal knowledge thereof, as required by Section 309(d)(1) of the Communications Act. While he did include an affidavit in his reply to the opposition, he still failed to comport with our procedural requirements by not serving a copy of the petition on PAI, the transferee. See 47 U.S.C. §309(d)(1). Additionally, Mr. Lampel does not meet the substantive requirements of standing under Section 309 as a "party in interest" merely by claiming to be a "ready, willing and able buyer." *Grayson Enterprises, Inc.*, 77 F.C.C. 2d 156, 161 (1980). Because he fails to meet our standing requirements, Mr. Lampel's petition will be treated as an informal objection pursuant to 47 C.F.R. §73.3587. *See, e.g., Pacific Broadcasting Corp.*, 66 F.C.C. 2d 256, 256-57 (1977). Similarly, although in his reply Mr. Lampel raises a series of new allegations in contravention of our rule requiring that a reply be limited to the matters raised in the opposition, 47 C.F.R. §1.45(c), we will nonetheless examine these allegations on their merits.

he will make available to the Commission documents and testimony to support his contentions, by not including such information within the petition he failed to support his allegations.

Indeed, none of the information provided in any of the pleadings supports Mr. Lampel's claims of irregularities in the auction process. Contrary to Lampel's assertions, PCI did not act improperly in employing an investment adviser to assist with this process. Such delegation of business dealings occurs frequently and does not violate any Commission rule or policy. Moreover, information proffered by PCI in its opposition to Mr. Lampel's filing rebuts his general allegations concerning unfairness in the bidding process. PCI submitted a copy of a letter written by its counsel responding to letters written by petitioner to Mrs. Park raising similar claims of unfairness. In this response letter, PCI notes that it and its investment adviser attempted to accommodate Mr. Lampel by, *inter alia*, providing his representative with the same information given to all other parties interested in acquiring the company, and by affording him an extra week to submit a final bid. Later, counsel for PCI even attempted to assist Mr. Lampel with the petition process by notifying him that he may be under the misimpression that the filing deadline for petitions to deny was December 7, 1994, rather than December 22, 1994. Although Mr. Lampel then claimed that PCI's counsel had attempted to mislead him concerning the deadline, no such deception occurred. Our Rules provide that petitions to deny must be filed within thirty days after issuance of public notice of the acceptance for filing of the application. 47 C.F.R. §73.3584(a). In this case, the thirty day period expired on December 22, 1994, as represented by PCI's counsel. Since the information provided in Mr. Lampel's reply does not demonstrate the occurrence of any harmful irregularities with the auction process, petitioner's generalized allegations concerning racial and religious discrimination, which he claims were manifest in the form of a biased auction process, remain unsubstantiated.

Finally, neither our attribution rules, nor our character qualifications policy, nor any other Commission rule or policy relating to a transfer of control, require that we examine either the past violations of law committed by a nonparty, such as the investment adviser, or the relationship between a limited partner of a nonparty and the board of directors of the transferor. Nor does precedent dictate that, in the circumstances here, we impute to the transferor any alleged misdeeds of the nonparty investment adviser. *See, e.g., Univision Holdings, Inc.*, 7 FCC Rcd 6672, 6682 (1992); *Character Qualifications*, 102 F.C.C. 2d 1179, 1205-06, *reconsidered in part*, 1 FCC Rcd 421 (1986); *Attribution of Ownership Interests*, 97 F.C.C. 2d 997. Similarly, none of our rules or policies require that the transferor note in its application that a member of its board also serves as a limited partner of its investment adviser. Thus, we reject Mr. Lampel's contention that these matters should affect our decision regarding grant of the transfer of control.

In its objection, MDC makes four allegations pertaining to PAI's major source of funding, a loan from the Retirement Systems of Alabama ("RSA"), the Alabama state employees and teachers pension fund. First, MDC urges that, given the potential risk involved in investing in a media conglomerate, a state pension fund should not be financing such a transaction, especially in a situation where, as here, it will have little control over the business. Additionally, MDC notes that Alabama's governor objected to a prior attempt by the RSA to purchase a television station and that since this transaction involves stations in Alabama, as well as in other states, the sale "represents not only a major conflict of interest with RSA and the Chief Executive Officer of the state [of Alabama], but creates a similar potential conflict with RSA and CEO's of several states charged with protecting retirement funds of similar employees." Next, it asserts that a pension fund should not make such a large investment, and questions whether PAI paid too much to acquire PCI. Lastly, MDC claims that the RSA has a large number of African American investors, but that it has not conducted activities aimed at benefitting Alabama's African American citizens.

MDC's concerns about the RSA will not affect our decision concerning grant of this transfer. No rule or policy confers on the Commission jurisdiction to examine the business decisions of a nonparty to the application where these decisions affect neither the qualifications of the applicants nor involve a public interest issue relating to a party to the transfer. This is true even where the nonparty, such as the RSA, provides the majority of the funding for the transaction. *See Attribution of Ownership Interests*, 97 F.C.C. 2d at 1022. Thus, as part of our determination about whether to approve the transfer, we have no authority to consider the wisdom of the pension fund's decision to invest in PAI in the manner in which it has chosen, the prudence of the price paid by PAI to acquire PCI, or the relationship between the RSA and the African American citizens of Alabama. *See Character Qualifications*, 102 F.C.C. 2d at 1205-06.[6]

Lastly, we find that MDC's concerns that the transfer will cause a conflict of interest between the RSA, the governor of Alabama, and the governors of other states, does not provide grounds to deny this transfer. As MDC noted in its objection, the former Alabama governor had protested the 1989 attempt by a subsidiary of the RSA to purchase WSFA(TV) Montgomery, Alabama, based on his belief that operation by a state agency of a television station which covers state government creates a conflict of interest. Ultimately the parties dismissed the assignment application, thus rendering the issue moot. *See* File No. BALCT-881223KH (1989). Not only does the instant transaction differ factually from the proposed WSFA(TV) transaction, but no elected officials have raised any similar concerns regarding potential conflicts of interest.

In conclusion, having considered all the materials before us in this matter, we find that Mr. Lampel and the MDC have failed to raise a substantial and material question of fact such that their allegations would warrant a hearing. 47 U.S.C. §309(d)(2). Further, based on the above representa-

[6] We also note that PAI complied with our application requirements by providing all necessary information about its funding sources, *see FCC 315: Application for Consent to Transfer of Control of Park Communications Inc.*, File Nos. BTCCT-941170KJ-LQ (Question 15 and 16, Exhibits B and C, and February 10, 1995 Amendment), and that nothing in this information indicates that the funding arrangement violates our rules. *See Data Transmission Co.*, 44 F.C.C. 2d 935, 936-37 (1974).

tions, we believe that a temporary waiver of Section 73.3555(c) is consistent with Commission precedent and will serve the public interest. Accordingly, your requested waiver of the one-to-a-market provision to permit Park Acquisitions, Inc. to hold cognizable interests in a television station, and an AM and FM station in the Greenville, North Carolina, Chattanooga, Tennessee and Richmond, Virginia markets IS GRANTED, subject to the condition that Park Acquisitions, Inc. shall divest itself of any interest in, and connection with, the radio stations no later than 12 months from consummation of this transaction. Additionally, the petition to deny filed by David Lampel, Atlas News and Information Services, Inc., when considered as an informal objection, and the informal objection filed by the Memphis Development Company ARE DENIED. Also, the petition filed by WVGO License Limited Partnership and Benchmark Radio Acquisition Fund III Limited Partnership IS DISMISSED. Furthermore, finding that the applicants are fully qualified and the public interest would be served thereby, the applications for transfer of control of the licensees of the 31 television and radio stations and the three television translators from Dorothy Park, Personal Representative of the Estate of Roy H. Park, to Park Acquisitions, Inc. ARE GRANTED.

This letter was adopted by the Commission on March 27, 1995

BY DIRECTION OF THE COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-211

In the Matter of

Amendment of Section 73.202(b), RM-8285
Table of Allotments,
FM Broadcast Stations.
(Arizona City, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 23, 1995; Released: April 10, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 4934 (1993), issued in response to a petition filed on behalf of Arizona City Broadcasting Corporation ("petitioner"), licensee of Station KONZ(FM), Channel 292A, Arizona City, Arizona, proposing the substitution of Channel 293A for Channel 292A and modification of its authorization accordingly to specify operation on the alternate Class A channel. Petitioner filed comments stating its intention to apply for Channel 293A, if allotted to Arizona City, as requested. No other comments were received.

2. We believe the public interest would be served by substituting Channel 293A for Channel 292A at Arizona City, since, as indicated in the *Notice*, the requested channel substitution would enable petitioner to significantly increase Station KONZ(FM)'s signal coverage area.

Technical Statement

3. Channel 293A can be allotted to Arizona City in conformity with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules without a site restriction at coordinates 32-45-21 and 111-40-13, as specified by the petitioner. As Arizona City is located within 320 kilometers (199 miles) of the Mexican border, concurrence of that Government in this proposal was obtained.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 25, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Arizona City, Arizona, as follows:

City	Channel No.
Arizona City, Arizona	293A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Arizona City Broadcasting Corporation (File No. BLH-920629KB) for Station KONZ(FM), IS MODIFIED to specify operation on Channel 293A in lieu of Channel 292A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KONZ(FM)'s license, BLH-920629KB, except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-920629KB, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b), **MM Docket No. 93-203**
Table of Allotments, RM-8245
FM Broadcast Stations. RM-8340
(Isleboro and Winter Harbor, Maine)

Amendment of Section 73.202(b), **MM Docket No. 93-206**
Table of Allotments, RM-8284
FM Broadcast Stations.
(Hermantown, Minnesota)

Amendment of Section 73.202(b), **MM Docket No. 93-213**
Table of Allotments, RM-8351
FM Broadcast Stations.
(Balsam Lake, Wisconsin)

Amendment of Section 73.202(b), **MM Docket No. 93-256**
Table of Allotments, RM-8326
FM Broadcast Stations.
(Taylorville, Illinois)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 24, 1995; Released: April 10, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it the petitions for reconsideration and motions for stay filed by Lakeside Broadcasting, Inc. (Athens, OH,[1] Isleboro, ME, Hermantown, MN, Balsam Lake, WI, Taylorville, IL), and Christopher DiPaola (Isleboro, ME) of the *Order* in the above-captioned proceedings, 9 FCC Rcd 6844 (1994), which announced a thirty-day application filing window opening on January 6, 1995, and closing on February 6, 1995.[2] The application filing windows established in the individual *Reports and Orders* had been frozen in response to the United States Court of Appeals decision in *Bechtel v. FCC*, 10 F. 2d 875 (D.C. Cir. 1993). Comments were filed by Miller Communications, Inc., in reference to the Taylorville, IL, window and by Nelsonville TV Cable, Inc., in reference to the Athens, OH, window. Lakeside and DiPaola subsequently filed a request for the withdrawal of their respective petitions for reconsideration. We will grant the requests.

2. IT IS ORDERED, That the petitions for reconsideration filed by Lakeside Broadcasting, Inc. and Christopher DiPaola ARE DISMISSED.

3. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] This *Memorandum Opinion and Order* does not affect the petition for reconsideration filed by David A. Ringer concerning the filing window for Channel 240A at Athens, Ohio, since he has not withdrawn his petition.

[2] Public Notice of the filing of the petitions for reconsideration was given on January 13, 1995, Report No. 2051.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

MM Docket No. 88-613

In the Matter of

Amendment of Section 73.202(b),	RM-6483
Table of Allotments,	RM-6712
FM Broadcast Stations.	
(Dickson, Tennessee; Benton	
and Calvert City, Kentucky)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 24, 1995; Released: April 10, 1995

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration and Stay of Assignment ("Petition") filed by Jackson Purchase Communications ("Jackson"). It requests reconsideration of the *Report and Order* (*"R&O"*) in this proceeding, 4 FCC Rcd 8707 (1989), which 1) granted a channel upgrade to a Station WQZQ-FM, Dickson, Tennessee, 2) authorized an equivalent channel substitution for Station WCBL-FM, Benton, Kentucky, to accommodate that upgrade, and 3) allotted to Calvert City Channel 239A (95.7 MHz), instead of Channel 256A (99.1 MHz) as requested by Jackson. It also asks for a stay of the window period announced by the *R&O* for acceptance of applications to operate on Channel 239A at Calvert City. American Communications, Inc., ("American"), licensee of Station WQZQ(FM), Dickson, Tennessee filed an opposition to Jackson's petition for reconsideration, and Purchase Broadcasting Company, Inc. ("Purchase"), licensee of WCBL-FM, filed a reply. Jackson subsequently filed a request for withdrawal of its Petition. We will grant Jackson's request.[1]

2. IT IS ORDERED That the petition for reconsideration filed by Jackson Purchase Communications IS DISMISSED.

3. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

4. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202) 418-2180.

[1] In accordance with §1.420(j) of the Commission's Rules, Jackson submitted a declaration stating that it has not received nor will receive any consideration for the withdrawal of its Petition.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-140

In the Matter of

Amendment of Section 73.202(b) RM-8543
Table of Allotments,
FM Broadcast Stations.
(Rapid City, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 24, 1995; Released: April 10, 1995

By the Chief, Allocations Branch:

1. At the request of Conway Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 7290 (1994), proposing the allotment of Channel 292C at Rapid City, South Dakota, as the community's sixth local FM transmission service.[1] Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. BCR Corporation also filed comments in support of the proposal.[2]

2. We believe the public interest would be served by the allotting Channel 292C at Rapid City, since it would provide the community with an additional local FM transmission service. An engineering analysis has determined that Channel 292C can be allotted at Rapid City in compliance with the Commission's minimum distance separation requirements at city reference coordinates.[3]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1 303(g)and(r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 25, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Rapid City, South Dakota	230C1, 250C1, 254C1, 262C1, 281C1, 292C

4. The window period for filing applications will open on **May 25, 1995**, and close on **June 26, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] We note that on February 6, 1995, petitioner also filed a proposal requesting the allotment of Channel 222C at Rapid City, South Dakota, which is pending.

[2] In conformance with the Commission's general policy of accepting late-filed comments where the proceeding is uncontested, we have accepted petitioner's comments for the purpose of allowing petitioner to reaffirm its interest in applying for Channel 292C at Rapid City. *See Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988).

[3] The coordinates for Channel 292C at Rapid City are North Latitude 44-04-50 and West Longitude 103-13-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-37

In the Matter of

Amendment of Section 73.606(b), RM-8586
Table of Allotments,
TV Broadcast Stations.
(Waimanalo, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 28, 1995; Released: April 10, 1995

By the Chief, Allocations Branch:

Comment Date: June 1, 1995
Reply Comment Date: June 16, 1995

1. Before the Commission for consideration is a petition for rule making filed by Joyce Cathcart ("petitioner"), requesting the allotment of UHF Television Channel 56 to Waimanalo, Hawaii, as that community's first local television service. Petitioner states its intention to apply for the channel, if allotted.

2. Petitioner notes that Waimanalo is a census designated place (CDP) with a 1990 population of 3,508, in Honolulu County (population 836,231)[1] located on the north shore of Oahu approximately 17.5 kilometers (11 miles) east of Honolulu. Petitioner submits that Waimanalo has its own post office, primary and secondary schools, banks, stores and a number of churches. Petitioner also notes that Waimanalo is comprised of civic organizations and businesses which associate themselves with the community of Waimanalo.

3. A staff engineering analysis of the proposal indicates that UHF Television Channel 56 can be allotted to Waimanalo, Hawaii, consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules.[2] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed allotment at Waimanalo is not affected thereby. *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order*, 52 FR 28346, July 29, 1987.

4. The Commission believes it would be in the public interest to seek comments on the proposal to amend, the TV Table of Allotments, Section 76.606(b) of the Commission 's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Waimanalo, Hawaii	--	56

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

6. Interested parties may file comments on or before **June 1, 1995**, and reply comments on or before **June 16, 1995** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Joyce Cathcart
1508 Halekoa Drive
Ainakoa, Hawaii 96821
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Population figures are taken from the 1990 U. S. Census.
[2] The proposed coordinates for Channel 56 at Waimanalo are North Latitude 21-21-00 and West Longitude 157-43-12.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-38

In the Matter of

Amendment of Section 73.606(b), RM-8587
Table of Allotments,
TV Broadcast Stations.
(Kailua, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 28, 1995; Released: April 10, 1995

Comment: June 1, 1995
Reply Comment: June 16, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Paul Alfred Tennyson ("petitioner"), requesting the allotment of UHF Television Channel 50 to Kailua, Hawaii, as that community's first local television service. Petitioner states its intention to apply for the channel, if allotted.

2. Petitioner notes that Kailua is a census designated place (CDP) with a 1990 population of 36,818 people, in Honolulu County (population 836,231)[1] located on the north shore of Oahu approximately 21 kilometers (13 miles) northeast of Honolulu. Petitioner submits that Kailua has its own post office, banks, a police department, hospital, churches, a junior college, primary and secondary schools, shopping centers, a community center, stores, and restaurants.

3. A staff engineering analysis of the proposal indicates that UHF Television Channel 50 can be allotted to Kailua, Hawaii, consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules.[2] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed allotment at Kailua is not affected thereby. *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order*, 52 FR 28346, July 29, 1987.

4. The Commission believes it would be in the public interest to seek comments on the proposal to amend, the TV Table of Allotments, Section 76.606(b) of the Commission 's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Kailua, Hawaii	--	50

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

6. Interested parties may file comments on or before **June 1, 1995**, and reply comments on or before **June 16, 1995** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Paul Alfred Tennyson
305 Hahani Street, #118
Kailua, Hawaii 96734

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Population figures are taken from the 1990 U. S. Census.
[2] The proposed coordinates for Channel 50 at Kailua are North Latitude 21-24-00 and West Longitude 157-44-30.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-36

In the Matter of

Amendment of Section 73.202(b), RM-8547
Table of Allotments,
FM Broadcast Stations.
(Billings, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 28, 1995; Released: April 10, 1995

Comment Date: June 1, 1995
Reply Comment Date: June 16, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Conway Broadcasting ("petitioner"), requesting the allotment of Channels 283C and 298C to Billings, Montana, as that community's eighth and ninth FM broadcast service. Petitioner submitted information in support of the allotments at Billings and stated its intention to file an application for both channel 283C and 298C if allotted to the community.

2. We believe petitioner's proposal warrants consideration. Channel 298C can be allotted to Billings, Montana, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1] Our analysis indicates that Channel 283C, however, is not available for allotment in Billings. The channel is short spaced to a proposal to allot Channel 286A to Billings, Montana, in MM Docket No. 94-68. *See* 9 FCC Rcd 3150 (1994).

3. In view of the fact that the proposed allotment would provide additional broadcast service to Billings, Montana, the Commission believes the public interest would be served by soliciting comments on Conway's proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below:

	Channel No.	
City	Present	Proposed
Billings, Montana	227C1, 231C, 246C2, 253C1, 275C1, 279C1	227C1, 231C, 242C1, 246C1, 253C1, 275C1, 279C1, 286A, 298C[2]

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 1, 1995**, and reply comments on or before **June 16, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Conway Broadcasting
4415 Fremont Avenue, South
Minneapolis, Minnesota 55409

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

[1] The coordinates for Channel 298C at Billings are 45-46-48 and 108-30-18.
[2] MM Docket No. 94-68, 9 FCC Rcd 3150 (1994), proposed the addition of Channel 286A to billings. The *Notice* in RM-8595 proposes to add Channel 242C1 to Billings.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-240

In the Matter of

Amendment of Section 73.202(b),	RM-7770
Table of Allotments,	RM-7848
FM Broadcast Stations.	
(Peshtigo and Valders,	
Wisconsin)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 30, 1995; Released: April 10, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 4927 (1991), issued in response to a petition filed by Good Neighbor Broadcasting, Inc. ("petitioner"), proposing the substitution of Channel 242C2 for Channel 241A, Peshtigo, Wisconsin.[2] Petitioner also requested modification of its construction permit for Station WJMR, Channel 8241A, to specify operation on Channel 242C2.[3] Petitioner filed comments in response to the *Notice* reiterating its intention to apply for Channel 242C2, if allotted to Peshtigo. Rural Radio Company ("Rural Radio") and WinCom Limited Partnership ("WinCom") filed counterproposals.[4] Petitioner and WinCom filed reply comments.

2. Rural Radio counterproposed the allotment of Channel 242A to Valders, Wisconsin. According to Rural Radio, adoption of its counterproposal is in the public interest as Valders, Wisconsin, and vicinity will receive its first local broadcast service. Rural Radio stated its intention to file an application for a channel at Valders.

3. Petitioner, in reply comments, argues that the engineering analysis for the proposal for Valders is faulty and that the counterproposal should be rejected. According to petitioner, Channel 242A at Valders, at Rural Radio's selected site, is short spaced to Station WKLH, Channel 243B, Milwaukee, Wisconsin. Further, should the allotment at Valders prevail, such an allotment would effectively deprive Peshtigo of its only local transmission service.[5] Petitioner states that its reason for the proposed substitution at Peshtigo is that construction of a station on Channel 241A has been effectively precluded by the loss of its originally proposed transmitter site and the subsequent restrictions imposed by the Commission's *Report and Order* in MM Docket No. 89-282, Whiting and De Pere, Wisconsin. *See* 6 FCC Rcd 2624 (1991). Petitioner notes that it had applied for a new transmitter site prior to the final decision in Docket 89-282. However, the Commission decided that rule making in a manner which restricted the Peshtigo channel to its original site, which was no longer available. Therefore, it has never operated Station WJMR in Peshtigo. Petitioner asserts that there are no other fully-spaced sites in Peshtigo available for construction of a station authorized to operate on Channel 241A that meets both FAA and FCC requirements.

4. We have before us two mutually exclusive rulemaking proposals. In an effort to accommodate both proposals, the staff performed a search to determine if an alternate channel was available to provide service to both communities. The study indicates that Channel 242 is the only channel that meets the spacing requirements. Therefore, our decision in this proceeding is guided by the allotment priorities as set forth in *Revision of the FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).[6]

5. In the present situation, petitioner is requesting an adjacent channel upgrade, which would trigger priority 4, while Rural Radio proposes a first local transmission service at Valders, which invokes priority 3. However, since the channel at Pehstigo has never been activated and is now precluded from operation in the community, we shall treat both proposals as requests for first local service under priority 3. In this regard we are persuaded by the petitioner's engineering showing that, due to the site restriction imposed on its station in MM Docket 89-282 and the subsequent loss of availability of this restricted transmitter site, the petitioner has been unable to provide a first local transmission service to Peshtigo. However, by making an adjacent channel upgrade, petitioner will be able to provide a first local transmission service to Peshtigo.

6. Since both proposals would effectively result in providing a first local transmission service to either community, we have looked at other factors such as the availability of reception services and relative populations.

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[1] The community of Valders has been added to the caption.

[2] An assignment of license from Good Neighbor Broadcasting, Inc. to Janet Callow was granted on June 18, 1992, and consummated on June 25, 1993 (BPH-881024MB).

[3] The call sign for Station WHYB-FM was changed to WJMR, effective July 15, 1992.

[4] The counterproposal filed by Rural Radio was placed on Public Notice on October 28, 1991, Report No. 1866 (RM-7848). WinCom states that petitioner's proposal is short spaced to its counterproposal filed in MM Docket 89-486, and resubmits the same counterproposal in this proceeding to protect the allotments proposed as part of MM Docket 89-486. The Peshtigo substitution is not in conflict with WinCom's filing in MM Docket 89-486, as WinCom's counterproposal was never accepted in that proceeding. In the *Report and Order* in Docket 89-486, WinCom's counterproposal was dismissed. *See* 6 FCC Rcd 7142 (1991). WinCom filed a Petition for Reconsideration of that *Report and Order*. On September 2, 1993, WinCom filed a request to withdraw its Petition for Reconsideration. A *Memorandum Opinion and Order* was adopted December 9, 1993, granting its request. As a result, we need not consider WinCom's counterproposal herein, or petitioner's responsive comments.

[5] Channel 241A was allotted to Peshtigo, Wisconsin, as a first local transmission service in MM Docket No. 87-480. *See* 3 FCC Rcd 4789 (1988). The filing window opened on September 23, 1988, and closed on October 24, 1988.

[6] (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) other public interest matters. [Co-equal weight given to priorities (2) and (3)].

In this regard, we find that the community of Peshtigo has a larger population (3,154) than Valders (905).[7] We also find that Peshtigo receives service from ten FM stations while the smaller community of Valders receives service from twelve FM stations. While Valders and Peshtigo are both incorporated, have their own post office and zip code, there is a considerable difference in the populations and the smaller community of Valders has more reception service. Thus, we believe that the public interest would be served by allotting Channel 242 to Peshtigo as a C2 facility since it has the larger population. *See Clarksville and Lanesville, Indiana,* 4 FCC Rcd 4968 (1989); *Roswell, Georgia,* 2 FCC Rcd 2775 (1987). Finally, while we agree with petitioner that the site specified for Channel 241A at Valders by Rural Radio is short spaced to Station WKLH, Milwaukee, the Commission generally does not protect a prospective applicant's desired transmitter site for a new allotment if a less restrictive site is available, as there is no guarantee that the petitioner will ultimately become the licensee. Therefore, we did not consider Rural Radio's proposed site for Channel 241A.

7. Channel 242C2 can be allotted to Peshtigo, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[8] Canadian concurrence has been obtained for this allotment since Peshtigo is located with 320 kilometers (200 miles) of the U.S.-Canadian border. In addition, we have authorized a modification of the construction permit for Station WJMR, Channel 241A, Peshtigo, Wisconsin, to specify operation on Channel 242C2 in accordance with Section 1.420(g) of the Commission's Rules.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 25, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Peshtigo, Wisconsin	242C2

9. IT IS FURTHER ORDERED, That the Secretary of the Commission, Shall Send by Certified Mail, Return Receipt Requested, a copy of this Order to the following:

Rural Radio Company
1296 Marian Lane
Green Bay,
Wisconsin 54304

Stanley S. Neustadt
Cohn and Marks
1333 New Hampshire
Ave., N.W., Suite 600
Washington, D.C. 20036
(counsel for WinCom
Wisconsin
Limited Partnership)

10. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WJMR, Peshtigo, Wisconsin, IS MODIFIED to specify operation on Channel 242C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Janet Callow, permittee of Station WJMR, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

12. IT IS FURTHER ORDERED, That the counterproposal (RM-7848) filed by Rural Radio Company IS DISMISSED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[7] All population figures are taken from the 1990 Census.
[8] The coordinates for Channel 242C2 at Peshtigo are 45-07-19 and 87-51-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GREAT WESTERN CELLULAR PARTNERS — File No. 10269-CL-P-492-A-88

For facilities in the Domestic Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 492, Minnesota 11-Goodhue

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1995; Released: April 10, 1995

By the Commission:

I. INTRODUCTION

1. This is a further reconsideration of our decision in Great Western Cellular Partners, 8 FCC Rcd 3222 (1993) (MO&O), where we addressed a petition for reconsideration filed by Great Western Cellular Partners (Great Western) and affirmed the dismissal of its application by the former Mobile Services Division of the Common Carrier Bureau (MSD). *See Cellwave Telephone Services,* 7 FCC Rcd 5955 (1992). Great Western filed an appeal of the MO&O in the United States Court of Appeals for the District of Columbia Circuit. We asked the court to remand the case for further reconsideration by this Commission.[1] On further reconsideration, and for the reasons discussed below, we affirm our previous decision.

II. BACKGROUND

2. On May 4, 1989, Great Western was named tentative selectee in the non-wireline lottery for the Minnesota 11 (Goodhue) Rural Service Area. In an amendment, Great Western informed the Commission that Mary Scott Taylor and Jay F. Pritchett, both holding 2.5 percent interests in the applicant, had formed P&T Limited Partnership between themselves prior to the filing of Great Western's application. The amendment further stated that P&T was a five percent general partner in Great Western. However, the original exhibit to the application did not list P&T, which purportedly was formed to insulate Ms. Taylor, a British citizen, as a partner. The MSD found that there was no evidence indicating that Mary Scott Taylor and Jay F. Pritchett formed a valid limited partnership and returned Great Western's application as defective.[2] On reconsideration, we affirmed the MSD's dismissal of Great Western's application.

3. In doing so, we also found that there was no evidence on the face of the application indicating that Mary Scott Taylor and Jay F. Pritchett formed a valid limited partnership. Because P&T Limited Partnership (P&T), the partnership allegedly formed by Taylor and Pritchett, failed to file its certificate of limited partnership with the county clerk's office prior to filing its application with the Commission, we stated that we could not find that Taylor was a limited partner pursuant to the requirements of Section 310(b)(3) of the Communications Act and Section 22.4 of the Commission's rules.[3] After that decision, Great Western filed another petition for reconsideration in which it argued that Pritchett and Taylor entered into an oral agreement which created, if not a limited partnership, then a valid general partnership. Great Western reasoned that as a general partner, P&T's inclusion did not violate Section 310(b) of the Act because Taylor's participation in the applicant was at all times through a sub-tier partnership and that she only could be attributed with, at most, 5 percent participation in Great Western -- far below the threshold of 20 percent set forth in Section 310(b)(3). In addition, Great Western argued that because neither Taylor nor Pritchett is an officer or director of the applicant nor a general partner of the applicant, there was no violation of Section 310(b)(3). We found, however, that there was a violation of the Act because, as general partners of P&T, which is in turn a general partner of Great Western, Taylor and Pritchett were treated as officers and directors of Great Western for the purposes of Section 310(b)(3) and "a common carrier license cannot be granted to an entity with an alien officer or director." MO&O at 3223.

4. Great Western filed an appeal of the MO&O in the United States Court of Appeals for the District of Columbia Circuit. The Commission sought a remand of the record for further consideration of the alien partnership issue raised by Great Western. This order addresses this issue.

III. DISCUSSION

5. Great Western contends that our decision affirming the MSD's dismissal of its application was based upon an incomplete analysis of state partnership law, because the Commission did not consider the consequences of a failed attempt to create an oral limited partnership, *i.e,* that Pritchett and Taylor created, as a minimum, a general partnership which had the effect of removing Taylor from a direct role in the applicant general partnership. The petitioner argues that at no time did Great Western have an alien general partner under local law.

6. Section 310(b)(3) prohibits aliens from possessing more than 20 percent ownership or voting interests in a licensee. In addition, this statutory provision also prohibits any alien from being an officer or director of a licensee. Section 310(b)(4) states that no "broadcast or common carrier" license shall be "granted to or held by . . . any corporation directly or indirectly controlled by any other

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[1] *See Great Western Cellular Partners v. Federal Communications Commission,* Motion For Remand of Record, No. 93-1379, (D.C. Cir., filed July 29, 1993), *granted* by Order, Sept. 20, 1993.

[2] See Letter from Gregory J. Vogt, Chief, Mobile Services Division, to S. Bramwell, dated Feb. 25, 1991.

[3] 47 U.S.C. §310(b)(3); 47 C.F.R. §22.4.

corporation of which any officer or more than one-fourth of the directors are aliens . . . ."[4] We have long held that these provisions were intended to limit both alien ownership beyond prescribed numerical thresholds and alien *control* of U.S. licensees.[5] In *Wilner & Scheiner*, the Commission explained how Section 310(b)(3) and 310(b)(4) are to be applied to various partnership arrangements.[6] The Commission held that both a partner in a general partnership and a general partner in a limited partnership have the power to manage the affairs of the company and to bind the partnership. 103 FCC 2d at 520 n.43. Therefore, these types of interests convey powers of control comparable to those of an officer or director as well as to those of a controlling stockholder. The Commission declared that in adopting Section 310(b)(3), Congress intended that aliens be prohibited entirely from holding such high level management positions. 103 FCC 2d at 516, 517. As a consequence, the Commission construed the provisions of Section 310(b)(3) and 310(b)(4) relating to officers and directors to encompass these partnership interests. 103 FCC 2d at 520 n.43. In addition, with respect to equity interests, the Commission has held that a general partner *cannot* be "insulated" from this controlling relationship through an intervening partnership; general partners are deemed to possess whatever interest is held by the partnership in which they are general partners.[7] Thus, for purposes of applying Sections 310(b)(3) and 310(b)(4), a general partner, regardless of her percentage of equity interest, will be deemed to have the ability to control the partnership and all that the partnership controls. In applying the tenets of *Wilner & Scheiner* to this case, we must determine whether Ms. Taylor's partnership interest is equivalent to powers held by a corporate officer or director with the ability to exert control over the corporation. We conclude that it is.

7. Assuming, arguendo, that P&T formed a valid sub-tier general partnership under state law, both Taylor and Pritchett had the ability to act as general partners in the applicant, Great Western. Pursuant to accepted constructs of partnership law, sub-tier general partners in a sub-tier partnership, that is a general partner in the applicant partnership can bind the applicant partnership, in the same manner as though they were each a general partner in the applicant.[8] Thus, it is manifest that the creation of a sub-tier structure does not affect the ultimate control exercised by the general partners of a general partnership. As such, under *Wilner & Scheiner* Ms. Taylor held a partnership interest that would be prohibited by Section 310(b)(3) of the Act.

8. Great Western argues that the Commission mistakenly believes that Mary Scott Taylor, a British citizen, was a general partner of Great Western at the time the application was originally filed. Instead, Great Western maintains that Pritchett and Taylor formed a valid sub-tier general partnership several months prior to the filing of Great Western's application and that the participation of that partnership as an investor in Great Western does not violate the Act or Commission policy regarding restrictions on alien investment or ownership. Great Western claims that Pritchett and Taylor orally agreed to form, at a minimum, a general partnership and that under either California or New Mexico law Pritchett and Taylor had formed a valid general partnership when Great Western filed its application with the Commission.[9] Great Western argues that it was this partnership -- P&T Limited Partnership -- which was a legal entity and general partner in Great Western. It is incorrect, Great Western asserts, that Ms. Taylor was, herself, a general partner in Great Western as the Commission maintained in the MO&O. Rather, Ms. Taylor's participation in the applicant always was through a sub-tier partnership and thus not in violation of the Act. Great Western maintains that the equity or voting restriction on alien ownership and interest, and the restriction on alien officers or director positions are not violated where, as here, the alien is a general partner in a sub-tier general partnership. As we have stated previously, sub-tier general partners in a partnership that is a *general* partner of the applicant are the functional equivalents of officers and directors of the applicant, because the sub-tier general partners can participate as general partners in the applicant general partnership. Thus, the arrangement described by Great Western, involving an alien in a sub-tier general partnership inside an applicant general partnership, violates Section 310(b)(3) of the Act because that alien is treated as a general partner and has the potential to exert influence and control over the licensee.

9. Great Western argues that the *Wilner & Scheiner* decision established a general principle treating partnerships similarly to corporations under Section 310(b) of the Act. It argues that applying that principle here requires a finding that alien general partners in a sub-tier partnership do not violate Section 310(b). Great Western contends that Section 310(b) prohibits only alien officers and directors of an applicant corporation,[10] or of a sub-tier corporation in direct or indirect control of an applicant,[11] but does not prohibit alien officers or directors of a non-controlling sub-tier corporation. It contends that a similar application of Section 310(b) to partnerships would prohibit aliens from being general partners in an applicant partnership, but would permit aliens to be general partners of a sub-tier partnership, provided that the partnership does not have a controlling interest in the applicant. It concludes that the P&T sub-tier partnership does not have a controlling interest in Great Western, and therefore there can be no violation of the alien ownership provisions of Section 310(b), as that section was interpreted by the Commission in *Wilner & Scheiner*. Great Western also cites *Data Transmission Co., supra* note 5, (*Data Transmission);* Advanced Mobile Phone Service, Inc., 54 RR 2d (P&F) 354, 357 (Com. Car. Bur. 1983) (*Advanced Mobile);* and McCaw Cellular Commu-

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[4] 47 U.S.C. §310(b)(3); 47 U.S.C. §310(b)(4).

[5] Data Transmission Company, 44 FCC 2d 935 (1974).

[6] 103 FCC 2d 511 at 516, 517 (1985) *aff'd on reconsideration,* 1 FCC Rcd 12 (1986). (*Wilner & Scheiner Reconsideration).*

[7] *See Attribution of Broadcast Interests* , 97 FCC 2d 997, 1022 (1984), *Attribution Recon. Order,* 58 RR 2d (P&F) 604 (1985), *Wilner & Scheiner,* 103 FCC 2d at 520 n.43.

[8] *See* Uniform Partnership Act (U.L.A.) §301(1).

[9] Counsel for Great Western requested an opinion from a New Mexico law firm regarding the existence of a partnership between Taylor and Pritchett. See Letter of Potter, Mills & Cassutt, P.A. to Philip L. Verveer, Esq., dated Oct. 12, 1992. The opinion states that under California law, it is necessary only that one manifest the "intention to form a partnership, a community of interest in the business and a sharing of profits and losses." Similarly, under New Mexico law Taylor and Pritchett would need only "the requisite intention to form a partnership."

[10] 47 U.S.C. §310(b)(3) (1982).

[11] 47 U.S.C. §310(b)(4) (1982).

nications, 4 FCC Rcd 3784 (Com. Car. Bur. 1989) (*McCaw Cellular)* as additional support for its contention that aliens may be general partners in a sub-tier partnership.

10. Great Western misperceives the underlying rationale of the Commission's ruling in *Wilner & Scheiner*. There, the Commission held that the purpose of Section 310(b)(3) and 310(b)(4) is to prevent alien ownership or control of certain licensees, and that officer and director positions are deemed to confer control. The Commission decided that Section 310(b)(3) precludes aliens from holding positions in a partnership licensee that are equivalent to the positions of officers and directors in a corporate licensee. That rationale governs here and, as we have explained, precludes aliens from participating as general partners in a sub-tier partnership that is a general partner in the applicant because a general partner in a sub-tier partnership is deemed to be in control of that partnership, and that partnership is in control of the licensee. In other words, because all of the partnerships in the licensee's chain of ownership are *general* partnerships, and all the partners are general partners, there is no break in the chain of control and the ability to control the licensee, Great Western, is directly imputed to the investors, including Taylor, through P&T. Thus, Taylor is deemed under our rules to have the ability to control the licensee in violation of Section 310(b).

11. The Data Transmission and McCaw Cellular cases concern non-controlling interests of aliens in corporations, not partnerships, and therefore are inapplicable here. Despite Great Western's argument to the contrary, the Commission distinguishes between corporations and partnerships for the purposes of determining whether an individual or entity has the ability to exercise control over a corporation or partnership. As we made clear in Wilner & Scheiner, in a partnership this interest is scrutinized carefully because general partners are the functional equivalents of officer and directors, who have the ability to exercise control over the day-to-day business affairs of the partnership. In this case, Mr. Pritchett and Ms. Taylor are in control of P&T, who is in turn a controlling party in Great Western with the ability to bind the applicant by nature of P&T's general partnership interest in the applicant.[12] *Advanced Mobile* is inapposite because the alien in question was not a partner in any sub-tier entity. Therefore that alien could not automatically bind the applicant partnership in the same manner that Ms. Taylor can bind Great Western. The analysis in *Advanced Mobile* was concerned only with the ownership interests of the corporation of which the alien was a vice president in order to determine whether the corporation had a prohibited interest in the applicant.

12. Great Western argues that non-U.S. citizens who participate in partnerships as general partners at levels other than the licensee or applicant level cannot be automatically disqualified. According to Great Western, the Commission supports this view, citing footnote 51 in Wilner & Scheiner.[13] In that note, the Commission gave examples of cases in which the use of the "multiplier" applies to properly insulated limited partnership interests. In its analysis, Great Western argues that the Commission intended to "continue its analogy between corporations and partnership and to review the participation of alien partners identically to the corporate model used in Section 310(b)." Great Western maintains that under this model, and under the statute, only general partners at the licensee level (Section 310(b)(3)) or at the level of a controlling entity (Section 310(b)(4)) are relevant and that the general partners of a non-controlling corporation are not reported or reviewed under Section 310(b).

13. Great Western's reliance on footnote 51 of Wilner & Scheiner is misplaced. In that footnote, Company A is presumed to be a properly insulated limited partnership. If Individual B is a non-insulated limited partner of Company A, then it is the equivalent of a general partner and therefore was attributed with full control of Company A. In that example, Company A itself has a 22 percent non-controlling interest in the licensee. Individual B, although it is attributed with full control of Company A, has no more control over the licensee than does Company A. In contrast, the alien in the instant case is a general partner in a general partnership, with the alien possessing full control of the general partnership that holds a general partnership (*i.e,* controlling) interest in the prospective licensee. The position held by Ms. Taylor is directly comparable to the position of an officer or director in a corporation who likewise exercises control.[14] The percentage of ownership is irrelevant in view of this relationship. Thus, the point of footnote 51 is not to establish the principle that sub-tier general partnerships are never accountable for control other than through the percentage held by the sub-tier entity. It is simply a discussion illustrating how the multiplier works to determine attributable interests in the case of properly insulated limited partners when there is no other control issue that eliminates the alien.

14. In its petition Great Western also argued (1) that the dismissal of its application violated the principle of Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965) because in a

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[12] It does not matter that the partnership papers of the applicant insulate Ms. Taylor from engaging in the business dealings of the applicant. As we have stated previously, this Commission has " no power to accord a statutory exemption' to a person holding a positional interest otherwise subject to the scope of Section 310(b) because he or she agrees, as a matter of private contract, not to exercise the powers inherent in that position." *Wilner & Scheiner Reconsideration* 1 FCC Rcd at 15. See also Continental Cellular, 6 FCC Rcd 6834, 6836 (1991), affirmed sub nom. Moving Phones Partnership, L.P. v. FCC, 998 F.2d 1051, (D.C. Cir. 1993). In other words, a general partner cannot be "insulated" from the affairs of the partnership (by contract or otherwise) under our rules. *Wilner & Scheiner, supra.*

[13] The pertinent part of that footnote stated:

> For example, assume that (1) Company A, a domestically organized limited partnership, holds 22 percent ownership interest in the licensee; (2) B, a natural person who is not a citizen of the United States, is a limited partner with a 25 percent ownership interest in Company A; and (3) all other direct or indirect interests in the licensee are held by United States citizens. If B's interest is adequately insulated, under the "multiplier" approach B would be attributed with 5.5 percent ownership interest in the licensee. If B is not insulated from active participation in the business, the multiplier would not be used and B would be attributed with 22 percent ownership interest in the licensee thereby violating the ownership benchmark established in Section 310(b)(3). 103 FCC 2d at 523, n.51.

[14] *Wilner & Scheiner Reconsideration,* 1 FCC Rcd at 14.

prior decision the Common Carrier Bureau allowed a cellular licensee with an alien interest to enter into a consent decree and settle with the Commission in order to keep its construction permit, Tellesis Partners, 7 FCC Rcd 3169 (1992); (2) that the Commission has interpreted incorrectly Section 310(b)(3) to exclude the benefits of foreign capital from federal licensees; and (3) that its application contained a mistake that can be corrected by minor amendment. These issues were addressed in the MO&O and we will not depart from our analysis there. See MO&O, 8 FCC Rcd at 3223.

IV. CONCLUSION

15. On reconsideration, we find no merit to Great Western's arguments that it did not violate the alien ownership prohibitions of Section 310(b) of the Communications Act. Therefore, because a radio common carrier license cannot be granted to an entity with an alien officer or director, we affirm dismissal of Great Western's application. Great Western's petition for reconsideration must be denied.

V. ORDERING PARAGRAPH

16. Accordingly, IT IS ORDERED that on further reconsideration we affirm denial of the petition for reconsideration filed by Great Western Cellular Partners (File No. 10269-CL-P-492-A-88).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vision Cable	CUID No. NC0167 (Southport, NC)
of Wilmington, Inc.	NC0172 (Yaupon Beach, NC)
FCC Physical	NC0229 (Brunswick, NC)
System ID	NC0270 (Ocean Isle Beach, NC)
No. 006743	NC0862 (Bolling Spring Lakes, NC)

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Vision Cable of Wilmington, Inc. ("Vision Cable") was charging for its Cable Programming Service ("CPS") Tiers in North Carolina, for CUID Nos. NC0167, NC0172, NC0229, NC0270, and NC0862. Vision Cable has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Vision Cable's prices only through May 14, 1994. As discussed below and based on the entire record before the Commission in this proceeding, we conclude that the CPS prices in effect for the period under review are not justified under the benchmark showing. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints for the franchise areas addressed in this Order were completed and served on Vision Cable and received by the Commission on the dates set forth in Appendix A.

5. Vision Cable submitted its initial CPS price justification through an FCC Form 393 filed on April 12, 1994 in response to the earliest valid complaint filed with the Commission for Ocean Isle Beach, North Carolina (CUID No. NC0270). Vision Cable supplemented its filings on July 1, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[11] by submitting a system-wide filing that included each franchise area in which a complaint was pending. The record indicates that the CUIDs addressed here constitute five separate franchise areas but are served through a single cable system, that Vision Cable charges the same prices for all rate-regulated cable services and associated equipment in each franchise area, and that Vision Cable offers the same channel line-ups in all five areas. Because there are no significant distinctions among Vision Cable's services and rates in these five areas, we will permit these rates to be justified through a single Form 393 filing. Vision Cable supplemented its Form 393 filings on December 21, 1994 in respone to the Commission's letter and telephone call which requested further clarification of its amended show-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Vision Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-36, 9 FCC Rcd 4119 (1994) (*"Second Order of Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Vision Cable implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Vision Cable's prices for the period after May 14, 1994 may be required to reflect the fact that Vision Cable's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

ing,[12] and on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[13]

III. DISCUSSION

6. Vision Cable asserts that its monthly price of $12.31 per subscriber for the Cable Service Tier is justified by its benchmark filing because its price is equal to the maximum permitted charge of $12.31 as calculated in the benchmark filing made on July 1, 1994. Vision Cable did not attempt to justify its monthly prices of $.60 per subscriber for the SuperStation Package and $3.50 per subscriber for the Preferred Service Package in the benchmark filing of July 1, 1994. In Vision Cable's amended filing of February 7, 1995, Vision Cable calculated the maximum permitted prices of $11.38 for the Cable Service Tier and $2.17 for the SuperStation Package and $2.17 for the Preferred Service Package. However, upon review of the entire record, we have determined that Vision Cable has not correctly calculated its maximum permitted prices for the Cable Service Tier, and it is therefore appropriate to make the following adjustments to Vision Cable's calculations in its July 1, 1994 Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Vision Cable did not correctly gross-up its tax entries. By placing entries in these columns, Vision Cable confirms that it is a tax-paying entity (*i.e.*, a "C" corporation). However, Vision Cable incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[14] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly adjusted tax entries.

b. In its calculations on Form 393, Part I, and Form 393, Part II, Worksheet 1, Vision Cable did not count as rate-regulated or as satellite channels eight channels that it offered as two separate *a la carte* packages of channels available either as packages or individually. The information before the Commission concerning Vision Cable's *a la carte* packages for the cable system serving CUID Nos. NC0167, NC0172, NC0229, NC0270, and NC0862 shows that Vision Cable restructured its cable service offerings in these five franchise areas similarly to the manner that it restructured its cable services and prices in the system serving the City of Charlotte and Mecklenburg County, North Carolina, where we have determined that the channels in the SuperStation Package and Preferred Service Package should be treated as rate-regulated service tiers.[15] Prior to September 1, 1993, three of the channels in the SuperStation Package (WTBS, WOR, and WGN) were offered as part of the Basic Tier and one channel (TNT) was part of the Cable Service Tier; the channels in the Preferred Service Package (Comedy, Cartoon, Sci-Fi, and Country Music TV) were previously offered as part of a separate Cable Service Tier. Consistent with the Commission's decision in the *Mecklenburg County* case, the SuperStation Package and the Preferred Service Package should have been treated as rate-regulated service tiers.[16] Vision Cable's *a la carte* offerings in this case are identical to the *Mecklenburg County* case, except in this case Vision Cable created the Preferred Service *a la carte* package using The Comedy Channel and The Cartoon Channel rather than the Comedy Central Channel and the SportsSouth Channel. The difference in the packages, however, is inconsequential and the material facts are indistinguishable. Vision Cable's maximum permitted prices are therefore determined by including the eight channels of the SuperStation and Preferred Service Packages as additional CPS tiers, increasing the total rate-regulated channels from 29 to 37 and the total satellite channels from 21 to 29. This adjustment is consistent with the information that Vision Cable included in its amendment on February 7, 1995.

c. Vision Cable submitted additional information in response to the Commission's inquiry which revised the number of non-addressable converters leased to subscribers as of the initial date of regulation. This change caused corresponding increases in the gross book value of converters and other figures which must be reported on Form 393, Part III, Schedule C.[17] We have recalculated Schedule C (and subse-

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[12] Letter from Gwendolyn G. Flowers, FCC, to Joel Reichard, Controller, Vision Cable of North Carolina, Inc. (Dec. 19, 1994); Letter from Joel Reichard to Gwendolyn G. Flowers, FCC (Dec. 21, 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

[14] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[15] *Vision Cable of North Carolina, Inc., Charlotte, North Carolina*, LOI 93-24, DA 94-1552 (Cab. Serv. Bur. released December 22, 1994) (*"Mecklenburg County"*). In the *Mecklenburg County* case, the SuperStation Package included three channels (WTBS, WOR, and WGN) that were offered before September 1, 1993 as part of the Basic Tier and one channel (TNT) that was offered previously as part of the Cable Service Tier. Vision Cable created the Preferred Service Package by including the same four channels (Sport South, Sci-Fi Channel, Comedy Central, and Country Music TV) previously offered as a separate Preferred Service Tier.

[16] *Id.*

[17] Letter from Gwendolyn G. Flowers, FCC, to Joel Reichard,

quent steps) to reflect Vision Cable's revised estimate of the number of non-addressable converter units leased to subscribers.

d. Vision Cable's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Vision Cable should have entered on line 104 the monthly equipment revenue figure it entered on Line 34 of Step G of Part III.[18] Accordingly, we have recalculated Worksheet 1 using the correct entry.

7. Because of these errors, we conclude that Vision Cable has failed to demonstrate that its prices for the CPS tiers were not unreasonable. We will therefore set prices for these tiers incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its amended Form 393, Vision Cable calculated the Inflation Adjustment Factor using data it relied on when it set its CPS prices. If based on this data Form 393 indicated that Vision Cable's prices were reasonable, then Vision Cable would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[19] However, Vision Cable has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Vision Cable should have filed Form 393 in each franchise area.[20] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.034 through December 1993.

8. These adjustments have the cumulative effect of reducing the maximum permitted monthly prices for the Cable Service Tier from $12.31 (as Vision Cable calculated in the benchmark filing on July 1, 1994) to $11.38. These adjustments further result in maximum permitted prices of $2.17 for the SuperStation Package and $2.17 for the Preferred Service Package.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Vision Cable's showing supports the maximum reasonable CPS tier prices of $11.38 for the Cable Service tier $2.17 for the SuperStation Package, and $2.17 for the Preferred Service Package (plus franchise fees) for the period from January 3, 1994 to May 14, 1994.[21] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. We further conclude that Vision Cable must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Vision Cable's prices during the earlier period were unreasonable.[22] We reserve the right to make further adjustments to Vision Cable's prices for the period after May 14, 1994, upon completion of our review of Vision Cable's FCC Form 1200 rate filings.

11. We further conclude that Vision Cable has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[23] As provided in the Public Notice, we will relieve Vision Cable of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Vision Cable of Wilmington, Inc. in Southport, North Carolina, CUID No. NC0167; Yaupon Beach, North Carolina, CUID No. NC0172; Brunswick County, North Carolina, CUID No. NC0229; Ocean Isle Beach, North Carolina, CUID No. NC0270; and Bolling Spring Lake, North Carolina, CUID No. NC0862, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the benchmark filings submitted by Vision Cable of Wilmington, Inc. with respect to Southport, North Carolina, CUID No. NC0167; Yaupon Beach, North Carolina, CUID No. NC0172; Brunswick County, North Carolina, CUID No. NC0229; Ocean Isle Beach, North Carolina, CUID No. NC0270; and Bolling Spring Lake, North Carolina, CUID No. NC0862, for the period beginning January 3, 1994 and ending on

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Controller, Vision Cable of North Carolina, Inc. (Dec. 19, 1994); Letter from Joel Reichard to Gwendolyn G. Flowers, FCC (Dec. 21, 1994).

[18] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[19] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[20] See 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page II, requires that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." In general, a cable operator must submit a justification for its rates no more than 30 days after service of the earliest valid complaint. 47 C.F.R. § 76.956(a). The Inflation Adjustment Factor therefore must be calculated as if Vision Cable had filed Form 393 within this 30-day period.

[21] This finding is based solely on the representations of Vision Cable listed in paragraph 5, *supra* and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[22] We reviewed Vision Cable's FCC Form 1200 rate filings and confirmed that Vision calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[23] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

May 14, 1994, justify the maximum monthly prices for Vision Cable of Wilmington, Inc.'s Cable Programming Service Tiers of $11.38 (plus franchise fee) for the Cable Service Tier, $2.17 (plus franchise fee) for the SuperStation Package, and $2.17 (plus franchise fee) for the Preferred Service Package.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Vision Cable of Wilmington, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service for the period from January 2, 1994[24] to May 14, 1994 which exceeded $11.38 per month (plus franchise fee) for the Cable Service Tier and $2.17 per month (plus franchise fee) for the SuperStation Package and were thus unreasonable, offset in each franchise area by the amounts paid by each subscribers during the same period for Cable Programming Service Tiers which were less than the maximum permitted price, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED that Vision Cable of Wilmington, Inc. shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Vision Cable of Wilmington, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Southport, North Carolina, CUID No. NC0167; Yaupon Beach, North Carolina, CUID No. NC0172; Brunswick County, North Carolina, CUID No. NC0229; Ocean Isle Beach, North Carolina, CUID No. NC0270; and Bolling Spring Lake, North Carolina, CUID No. NC0862, for the period beginning May 15, 1994, to include the SuperStation Package and the Preferred Service Package as Cable Programming Service Tiers and to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum prices for those franchise areas (plus franchise fee).

17. IT IS FURTHER ORDERED that Vision Cable of Wilmington, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

18. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Vision Cable of Wilmington, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
NC01670	1/03/94	12/29/93
NC0172	01/03/94	12/29/93
NC0229	01/03/94	12/30/93
NC0270	01/05/94	12/23/93
NC0862	01/03/94	12/28/93

[24] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vision Cable	CUID No. NC0174 (Cabarrus, NC)
of Metrolina, Inc.	NC0193 (Kannapolis, NC)
FCC Physical System	NC0284 (China Grove, NC)
ID No. 004525	NC0287 (Harrisburg, NC)
	NC0288 (Landis, NC)
	NC0455 (Mount Pleasant, NC)

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Vision Cable of Metrolina, Inc. ("Vision Cable") was charging for its Cable Programming Service ("CPS") Tiers for CUID Nos. NC0174, NC0193, NC0284, NC0287, NC0288, and NC0455. Vision Cable has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Vision Cable's prices only through May 14, 1994. As discussed below and based on the entire record before the Commission in this proceeding, we conclude that the CPS prices in effect for the period under review are not justified under the benchmark showing. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints for the franchise areas addressed in this Order were completed and served on Vision Cable and received by the Commission on the dates set forth in Appendix A.

5. Vision Cable submitted its initial CPS price justification through an FCC Form 393 filed on November 19, 1993 in response to the earliest valid complaint filed with the Commission for Kannapolis, NC (CUID No. NC0193). Vision Cable submitted identical benchmark justifications in response to complaints for each of the other franchise areas included in this Order on January 28, 1994. Vision Cable supplemented its filings on June 21, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[11] by submitting a system-wide filing that included each franchise area in which a complaint was pending. The record indicates that the CUIDs addressed here constitute six separate franchise areas but are served through a single cable system, that Vision Cable charges the same prices for all rate-regulated cable services and associated equipment in each franchise area, and that Vision Cable offers the same channel line-ups in all six areas. Because there are no significant distinctions among Vision Cable's services and rates in these six areas, we will permit these rates to be

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Vision Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-36, 9 FCC Rcd 4119 (1994) (*"Second Order of Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Vision Cable implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Vision Cable's prices for the period after May 14, 1994 may be required to reflect the fact that Vision Cable's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

justified through a single Form 393 filing. Vision Cable supplemented its Form 393 filings on December 21, 1994, in response to the Commission's letter and telephone call which requested further clarification of its amended showing,[12] and on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[13]

III. DISCUSSION

6. Vision Cable asserts that its monthly price of $14.04 per subscriber for the Cable Service Tier is justified by its benchmark filing because its price is equal to the maximum permitted charge of $14.04 as calculated in the benchmark filing made on June 21, 1994. Vision Cable did not attempt to justify its monthly prices of $.60 per subscriber for the SuperStation Package and $3.50 per subscriber for the Preferred Service Package in the benchmark filing of June 21, 1994. In Vision Cable's amended filing of February 7, 1995, Vision Cable calculated maximum permitted prices of $12.83 for the Cable Service Tier and $1.75 for the SuperStation Package and $2.33 the Preferred Service Package. However, upon review of the entire record, we have determined that Vision Cable has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Vision Cable's calculations in its June 21, 1994 Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Vision Cable did not correctly gross-up its tax entries. By placing entries in these columns, Vision Cable confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Vision Cable incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[14] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly adjusted tax entries.

b. In its calculations on Form 393, Part I, and Form 393, Part II, Worksheet 1, Vision Cable did not count as rate-regulated or as satellite channels seven channels that it offered as part of two *a la carte* packages of channels available either as packages or individually. The information before the Commission concerning Vision Cable's *a la carte* packages for the cable system serving CUID Nos. NC0174, NC0193, NC0284, NC0287, NC0288, and NC0455 shows that Vision Cable restructured its cable service offerings in these six franchise areas in the same manner that it restructured its cable services and prices in the system serving the City of Charlotte and Mecklenburg County, North Carolina, where the Commission has determined that the channels in the SuperStation Package and Preferred Service Package should be treated as rate-regulated service tiers.[15] Prior to September 1, 1993, three of the channels in the SuperStation Package (WTBS, WOR, and WGN) were offered as part of the Basic Tier and one channel (TNT) was part of the Cable Service Tier; the three channels in the Preferred Service Package (Sport South, Sci-Fi, and Country Music TV) were previously offered as part of a separate Cable Service Tier. The fourth channel on the previous tier, Video Hits #1, was moved to the Cable Service Tier, effective September 1, 1993. Consistent with the Commission's decision for the *Mecklenburg County* case, the SuperStation Package and the Preferred Service Package should have been treated as rate-regulated service tiers.[16] Vision Cable's *a la carte* offerings in this case are identical to the *Mecklenburg County* case, except in this case Vision Cable included only 3 of the 4 channels previously a part of the Preferred Service Tier to create the Preferred Service *a la carte* package and moved the fourth channel to the Cable Service Tier. The difference in the packages, however is inconsequential and the material facts are indistinguishable. Vision Cable's maximum permitted prices are therefore determined by including the seven channels of the SuperStation and Preferred Service Packages as additional CPS tiers, increasing the total rate-regulated channels from 30 to 37 and the total satellite channels from 22 to 29. This adjustment is consistent with the information that Vision Cable included in its amendment on February 7, 1995.

c. Vision Cable submitted additional information in response to the Commission's inquiry which revised the number of non-addressable converters leased to subscribers as of the initial date of regulation. This change caused corresponding increases in the gross book value of converters and other figures which 8must be reported on Form 393, Part III, Schedule

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[12] Letter from Gwendolyn G. Flowers, FCC, to Joel Reichard, Controller, Vision Cable of North Carolina, Inc. (Dec. 19, 1994); Letter from Joel Reichard to Gwendolyn G. Flowers, FCC (Dec. 21, 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

[14] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[15] *Vision Cable of North Carolina, Inc., Charlotte, North Carolina*, LOI 93-24, DA 94-1552 (Cab. Serv. Bur. released December 22, 1994) (*"Mecklenburg County"*). In the *Mecklenburg County* case, the SuperStation Package included three channels (WTBS, WOR, and WGN) that were offered before September 1, 1993 as part of the Basic Tier and one channel (TNT) that was offered previously as part of the Cable Service Tier. Vision Cable created the Preferred Service Package by including the same four channels (Sport South, Sci-Fi Channel, Comedy Central, and Country Music TV) previously offered as a separate Preferred Service Tier.

[16] *Id.*

C.[17] We have recalculated Schedule C (and subsequent steps) to reflect Vision Cable's revised estimate of the number of non-addressable converter units leased to subscribers.

d. Vision Cable's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Vision Cable should have entered on line 104 the monthly equipment revenue figure it entered on Line 34 of Step G of Part III.[18] Accordingly, we have recalculated Worksheet 1 using the correct entry.

7. Because of these errors, we conclude that Vision Cable has failed to demonstrate that its prices for the CPS tiers were not unreasonable. We will therefore set prices for these tiers incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its amended Form 393, Vision Cable calculated the Inflation Adjustment Factor using data it relied on when it set its CPS prices. If based on this data Form 393 indicated that Vision Cable's prices were reasonable, then Vision Cable would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[19] However, Vision Cable has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Vision Cable first filed Form 393 in each franchise area.[20] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992, 125.7 for the third quarter of 1993, and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.030 through October 1993 for CUID No. NC0016, and 1.032 through November 1993 for CUID No. NC0140, and 1.034 through December 1993 for CUID Nos. NC0041 and NC0692.

8. These adjustments have the cumulative effect of reducing the maximum permitted monthly prices for the cable service tier from $14.04 (as Vision Cable calculated in the benchmark filing on June 21, 1994) to the amounts set forth in Appendix B. These adjustments further result in the maximum permitted prices set forth in Appendix B for the SuperStation Package and the Preferred Service Package.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Vision Cable's showing supports the maximum reasonable CPS tier prices set forth in Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[21] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. We further conclude that Vision Cable must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Vision Cable's prices during the earlier period were unreasonable.[22] We reserve the right to make further adjustments to Vision Cable's prices for the period after May 14, 1994, upon completion of our review of Vision Cable's FCC Form 1200 rate filings.

11. We further conclude that Vision Cable has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[23] As provided in the Public Notice, we will relieve Vision Cable of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Vision Cable of Metrolina, Inc. in Cabarrus, North Carolina, CUID No. NC0174; Kannapolis, North Carolina, CUID No. NC0193; China Grove, North Carolina, CUID No. NC0284; Harrisburg, North Carolina, CUID No. NC0287; Landis, North Carolina, CUID No. NC0288; Mount Pleasant, North Carolina, CUID No. NC0455, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the benchmark filings submitted by Vision Cable of Metrolina, Inc. with respect to Cabarrus, North Carolina, CUID No. NC0174; Kannapolis, North Carolina, CUID No. NC0193; China Grove, North Carolina, CUID No. NC0284; Harrisburg, North Carolina, CUID No. NC0287; Landis, North Carolina, CUID No. NC0288; Mount Pleasant, North Carolina, CUID No. NC0455 for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justify the maximum prices in each franchise area set forth in Appendix B (plus franchise fee) for Vision Cable of Metrolina, Inc.'s Cable Programming Service Tiers.

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[17] Letter from Gwendolyn G. Flowers, FCC, to Joel Reichard, Controller, Vision Cable of North Carolina, Inc. (Dec. 19, 1994); Letter from Joel Reichard to Gwendolyn G. Flowers, FCC (Dec. 21, 1994).

[18] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[19] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[20] See 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[21] This finding is based solely on the representations of Vision Cable listed in paragraph 5, *supra* and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[22] We reviewed Vision Cable's FCC Form 1200 rate filings and confirmed that Vision calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[23] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Vision Cable of Metrolina, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[24] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month and were thus unreasonable, offset in each franchise area by the amounts paid by each subscribers during the same period for Cable Programming Service Tiers which were less than the maximum permitted price, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED that Vision Cable of Metrolina, Inc. shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 60 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Vision Cable of Metrolina, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Cabarrus, North Carolina, CUID No. NC0174; Kannapolis, North Carolina, CUID No. NC0193; China Grove, North Carolina, CUID No. NC0284; Harrisburg, North Carolina, CUID No. NC0287; Landis, North Carolina, CUID No. NC0288; and Mount Pleasant, North Carolina, CUID No. NC0455, for the period beginning May 15, 1994, to include the SuperStation Package and the Preferred service Package as Cable Programming Service Tiers and to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum prices in each franchise area set forth in Appendix B (plus franchise fee).

17. IT IS FURTHER ORDERED that Vision Cable of Metrolina, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

18. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Vision Cable of Metrolina, Inc., shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
NC0174	01/03/94	12/28/93
NC0193	10/12/93	10/08/93
NC0284	01/07/94	12/31/93
NC0287	01/07/94	12/31/93
NC0288	01/07/94	12/31/93
NC0455	01/06/94	12/31/93

Appendix B

Maximum Permitted Rates

CUID No.	Cable Service	SuperStation	Preferred Service
NC0174	12.76	2.32	1.74
NC0193	12.70	2.30	1.73
NC0284	12.76	2.32	1.74
NC0287	12.76	2.32	1.74
NC0288	12.76	2.32	1.74
NC0455	12.76	2.32	1.74

[24] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vision Cable	CUID No. NC0168 (Morehead City, NC)
of Morehead, Inc.	NC0196 (Beaufort, NC)
FCC Physical	NC0197 (Atlantic Beach, NC)
System ID	NC0198 (Pine Knoll Shores, NC)
No. 007471	NC0199 (Emerald Isle, NC)
	NC0200 (Cape Carteret, NC)
	NC0201 (New Port, NC)
	NC0202 (Carter, NC)
	NC0203 (Swansboro, NC)
	NC0205 (Craven, NC)
	NC0282 (Indian Beach, NC)
	NC0815 (Cedar Point, NC)

Benchmark Filing To Support
Cable Programming ServicePrice

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Vision Cable of Morehead, Inc. ("Vision Cable") was charging for its Cable Programming Service ("CPS") tiers in North Carolina, for CUID Nos. NC0168, NC0196, NC0197, NC0198, NC0199, NC0200, NC0201, NC0202, NC0203, NC0205, NC0282, and NC0815. Vision Cable has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Vision Cable's prices only through May 14, 1994. As discussed below and based on the entire record before the Commission in this proceeding, we conclude that the CPS prices in effect for the period under review are not justified under the benchmark showing. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993. [6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints for the franchise areas addressed in this Order were completed and served on Vision Cable and received by the Commission on the dates set forth in Appendix A.

5. Vision Cable submitted its initial CPS price justification through an FCC Form 393 filed on November 11, 1993 in response to the earliest valid complaint filed with the Commission for Morehead, North Carolina (CUID No. NC0201). Vision Cable filed its first FCC Form 393 filings for Carter, North Carolina, CUID No. NC0202 on November 15, 1993; Morehead, North Carolina, CUID No. NC0168 on November 18, 1993; Beaufort, North Carolina, CUID No. NC0196, Atlantic Beach, North Carolina, CUID No. NC0197, Pine Knoll Shores, North Carolina, CUID No. NC0198, Emerald Isle, North Carolina, CUID No. NC0199, Cape Carteret, North Carolina, CUID No. NC0200, Swansboro, North Carolina, CUID No. NC0203, Craven, North Carolina, CUID No. NC0205, and Cedar

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Vision Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-36, 9 FCC Rcd 4119 (1994) (*"Second Order of Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Vision Cable implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Vision Cable's prices for the period after May 14, 1994 may be required to reflect the fact that Vision Cable's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

Point, North Carolina, CUID No. NC0815 on January 10, 1994; and Indian Beach, North Carolina, CUID No. NC0282 on January 12, 1994. Vision Cable supplemented its filings on June 21, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[11] by submitting a system-wide filing that included each franchise area in which a complaint was pending. The record indicates that the CUIDs addressed here constitute twelve separate franchise areas but are served through a single cable system, that Vision Cable charges the same prices for all rate-regulated cable services and associated equipment in each franchise area, and that Vision Cable offers the same channel line-ups in all twelve areas. Because there are no significant distinctions among Vision Cable's services and rates in these twelve areas, we will permit these rates to be justified through a single Form 393 filing. Vision Cable supplemented its Form 393 filings on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. Vision Cable asserts that its monthly price of $14.84 per subscriber for the Cable Service Tier is justified by its benchmark filing because its price is equal to the maximum permitted charge of $14.84 as calculated in the benchmark filing made on June 21, 1994. Vision Cable did not attempt to justify its monthly prices of $2.95 per subscriber for the SuperStation Package and $1.15 per subscriber for the Preferred Service Package in its benchmark filing on June 21, 1994. In Vision Cable's amended filing of February 7, 1995, Vision Cable calculated maximum permitted prices of $12.29 for the Cable Service Tier, $2.59 for the SuperStation Package and $1.94 for the Preferred Service Package. However, upon review of the entire record, we have determined that Vision Cable has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Vision Cable's calculations in its Form 393 filed on June 21, 1993:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Vision Cable did not correctly gross-up its tax entries. By placing entries in these columns, Vision Cable confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Vision Cable incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[13] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly adjusted tax entries.

b. In its calculations on Form 393, Part I, and Form 393, Part II, Worksheet 1, Vision Cable did not count as rate-regulated or as satellite channels seven channels that it offered as part of two *a la carte* packages of channels available either as packages or individually. The information before the Commission concerning Vision Cable's *a la carte* packages for the cable system serving CUID Nos. NC0168, NC0196, NC0197, NC0198, NC0199, NC0200, NC0201, NC0202, NC0203, NC0205, NC0282, and NC0815 shows that Vision Cable restructured its cable service offerings in these twelve franchise areas in the same manner that it restructured its cable services and prices in the system serving the City of Charlotte and Mecklenburg County, North Carolina, where the Commission has determined that the channels in the SuperStation Package and Preferred Service Package should be treated as rate-regulated service tiers.[14] Prior to September 1, 1993, two of the channels in the SuperStation Package (WTBS and WGN) were offered as part of the Basic Tier and two channels (TNT and Discovery) were part of the Cable Service Tier; the three channels in the Preferred Service Package (Sci-Fi, Country Music TV, and The Learning Channel) were previously offered as a separate Preferred Service Tier. Consistent with the Commission's decision in the Mecklenburg County case, the SuperStation Package and the Preferred Service Package should have been treated as rate-regulated service tiers.[15] Vision Cable's *a la carte* offerings in this case are identical to the *Mecklenburg County* case, except in this case the Preferred Service consisted three channels rather than four channels and the identity of some of those channels was different. The difference in the packages, however, is inconsequential and the material facts are indistinguishable. Vision Cable's maximum permitted prices are therefore determined by including the seven channels of the SuperStation and Preferred Service Packages as additional CPS tiers, increasing the total rate-regulated

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[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

[13] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[14] *Vision Cable of North Carolina, Inc., Charlotte, North Carolina*, LOI 93-24, DA 94-1552 (Cab. Serv. Bur. released December 22, 1994) (*"Mecklenburg County"*). In the *Mecklenburg County* case, the SuperStation Package included three channels (WTBS, WOR, and WGN) that were offered before September 1, 1993 as part of the Basic Tier and one channel (TNT) that was offered previously as part of the Cable Service Tier. Vision Cable created the Preferred Service Package by including the same four channels (Sport South, Sci-Fi Channel, Comedy Central, and Country Music TV) previously offered as a separate Preferred Service Tier.

[15] *Id.*

channels from 25 to 32 and the total satellite channels from 19 to 26. This adjustment is consistent with the information that Vision Cable included in its amendment on February 7, 1995.

c. Vision Cable submitted additional information in response to the Commission's inquiry which revised upward the number of non-addressable converters leased to subscriber as of the initial date of regulation. This change caused corresponding increases in the gross book value of converters and other figures which must be reported on Form 393, Part III, Schedule C.[16] We have recalculated Schedule C (and subsequent steps) to reflect Vision Cable's revised estimate of the number of non-addressable converter units leased to subscribers.

d. Vision Cable's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Vision Cable should have entered on line 104 the monthly equipment revenue figure it entered on Line 34 of Step G of Part III.[17] Accordingly, we have recalculated Worksheet 1 using the correct entry.

7. Because of these errors, we conclude that Vision Cable has failed to demonstrate that its prices for the CPS tiers were not unreasonable. We will therefore set prices for these tiers incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its amended Form 393, Vision Cable calculated the Inflation Adjustment Factor using data it relied on when it set its CPS prices. If based on this data Form 393 indicated that Vision Cable's prices were reasonable, then Vision Cable would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[18] However, Vision Cable has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Vision Cable first filed Form 393 in each franchise area.[19] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992, 125.7for the third quarter of 1993, and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.028 through September 1993 for CUID No. NC0199; 1.030 through October 1993 for CUID Nos. NC0201 and NC0202; 1.032 through November 1993 for CUID No. NC0168; and 1.034 through December 1993 for NC0196, NC0197, NC0198, NC0200, NC0203, NC0205, NC0282, and NC0815.

8. These adjustments have the cumulative effect of reducing the maximum permitted monthly price for the Cable Service Tier from $14.84 (as Vision Cable calculated in its benchmark filing on June 21, 1994) to the amounts set forth in Appendix B. These adjustments further result in the maximum permitted prices set forth in Appendix B for the SuperStation Package and the Preferred Service Package.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Vision Cable's showing supports the maximum reasonable CPS tier prices set forth in Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[20] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. We further conclude that Vision Cable must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Vision Cable's prices during the earlier period were unreasonable.[21] We reserve the right to make further adjustments to Vision Cable's prices for the period after May 14, 1994, upon completion of our review of Vision Cable's FCC Form 1200 rate filings.

11. We further conclude that Vision Cable has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[22] As provided in the Public Notice, we will relieve Vision Cable of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the Cable Programming Serviceprices charged by Vision Cable of Morehead, Inc. in Morehead City, North Carolina, CUID No. NC0168; Beaufort, North Carolina, CUID No.

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[16] Letter from Gwendolyn G. Flowers, FCC, to Joel Reichard, Controller, Vision Cable of North Carolina, Inc. (Dec. 19, 1994); Letter from Joel Reichard to Gwendolyn G. Flowers, FCC (Dec. 21, 1994).

[17] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[18] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[19] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page II, requires that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form. In general, a cable operator mut submit a justification for its rates no later than 30 days after service of the earliest valid complaint." 47 C.F.R. § 76.956(a). The Inflation Adjustment Factor therefore must be calculated as if Vision Cable filed Form 393 within this 30-day period.

[20] This finding is based solely on the representations of Vision Cable listed in paragraph 5, *supra* and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[21] We reviewed Vision Cable's FCC Form 1200 rate filings and confirmed that Vision calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[22] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

NC0196; Atlantic Beach, North Carolina, CUID No. NC0197; Pine Knoll Shores, North Carolina, CUID No. NC0198; Emerald Isle, NC, CUID No. NC0199; Cape Carteret, North Carolina, CUID No. NC0200; New Port, North Carolina, CUID No. NC0201; Carter, North Carolina, CUID No. NC0202; Swansboro, North Carolina, CUID No. NC0203; Craven, North Carolina, CUID No. NC0205; Indian Beach, North Carolina, CUID No. NC0282; and Cedar Point, North Carolina, CUID No. NC0815, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the benchmark filings submitted by Vision Cable of Morehead, Inc. with respect to Morehead City, North Carolina, CUID No. NC0168; Beaufort, North Carolina, CUID No. NC0196; Atlantic Beach, North Carolina, CUID No. NC0197; Pine Knoll Shores, North Carolina, CUID No. NC0198; Emerald Isle, North Carolina, CUID No. NC0199; Cape Carteret, North Carolina, CUID No. NC0200; New Port, North Carolina, CUID No. NC0201; Carter, North Carolina, CUID No. NC0202; Swansboro, North Carolina, CUID No. NC0203; Craven, North Carolina, CUID No. NC0205; Indian Beach, North Carolina, CUID No. NC0282; and Cedar Point, North Carolina, CUID No. NC0815, for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justify the maximum prices in each franchise area set forth in Appendix B (plus franchise fee) for Vision Cable of Morehead, Inc.'s Cable Programming Service Tiers.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Vision Cable of Morehead, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[23] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month and were thus unreasonable, offset in each franchise area by the amounts paid by each subscribers during the same period for cable programming service tiers which were less than the maximum permitted price, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED that Vision Cable of Morehead, Inc. shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Vision Cable of Morehead, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Vision Cable of Morehead, Inc. in Morehead City, North Carolina, CUID No. NC0168; Beaufort, North Carolina, CUID No. NC0196; Atlantic Beach, North Carolina, CUID No. NC0197; Pine Knoll Shores, North Carolina, CUID No. NC0198; Emerald Isle, North Carolina, CUID No. NC0199; Cape Carteret, North Carolina, CUID No. NC0200; New Port, North Carolina, CUID No. NC0201; Carter, North Carolina, CUID No. NC0202; Swansboro, North Carolina, CUID No. NC0203; Craven, North Carolina, CUID No. NC0205; Indian Beach, North Carolina, CUID No. NC0282; and Cedar Point, North Carolina, CUID No. NC0815, for the period beginning May 15, 1994, to include the SuperStation Package and the Preferred Service Package as Cable Programming Service Tiers and to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum prices in each franchise area set forth in Appendix B (plus franchise fee).

17. IT IS FURTHER ORDERED that Vision Cable of Morehead, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

18. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Vision Cable of Morehead, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint	Date Complaint Filed with FCC Served
NC0168	12-16-93	11-05-93
NC0196	01-03-94	12-30-93
NC0197	01-11-94	12-29-93
NC0198	01-04-94	12-30-93
NC0199	10-12-93	09-19-93
NC0200	01-03-94	12-29-03
NC0201	10-25-93	10-06-93
NC0202	10-26-93	10-22-93
NC0203	01-03-94	12-30-93
NC0205	01-04-94	12-30-93
NC0282	01-04-94	12-30-93
NC0815	01-04-94	12-30-93

[23] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Appendix B

Maximum Permitted Rates

CUID No.	Cable Service	SuperStation	Preferred Service
NC0168	$12.23	$2.58	$1.93
NC0196	$12.26	$2.58	$1.94
NC0197	$12.26	$2.58	$1.94
NC0198	$12.26	$2.58	$1.94
NC0199	$12.18	$2.56	$1.92
NC0200	$12.26	$2.58	$1.94
NC0201	$12.21	$2.57	$1.93
NC0202	$12.21	$2.57	$1.93
NC0203	$12.26	$2.58	$1.94
NC0205	$12.26	$2.58	$1.94
NC0282	$12.26	$2.58	$1.94
NC0815	$12.26	$2.58	$1.94

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vision Cable of	CUID No. NC0016 (Wilmington, NC)
Wilmington, Inc.	NC0041 (Wrightsville Beach, NC)
FCC Physical	NC0140 (New Hanover, NC)
System ID	NC0692 (Navassa, NC)
No. 007255	

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Vision Cable of Wilmington, Inc. ("Vision Cable") was charging for its Cable Programming Service ("CPS") Tiers in North Carolina, for CUID Nos. NC0016, NC0041, NC0140, and NC0692. Vision Cable has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Vision Cable's prices only through May 14, 1994. As discussed below and based on the entire record before the Commission in this proceeding, we conclude that the CPS prices in effect for the period under review are not justified under the benchmark showing. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints for the franchise areas addressed in this Order were completed and served on Vision Cable and received by the Commission on the dates set forth in Appendix A.

5. Vision Cable submitted its initial CPS price justification through an FCC Form 393 filed on November 19, 1993 in response to the earliest valid complaint filed with the Commission for Wilmington, North Carolina (CUID No. NC0016). Vision Cable supplemented its filings on April 19, 1994 and June 21, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[11] by submitting a system-wide filing that included each franchise area in which a complaint was pending. The record indicates that the CUIDs addressed here constitute four separate franchise areas but are served through a single cable system, that Vision Cable charges the same prices for all rate-regulated cable services and associated equipment in each franchise area, and that Vision Cable offers the same channel lineups in all four areas. Because there are no significant distinctions among Vision Cable's services and rates in these four areas, we will permit these rates to be justified through a single Form 393 filing. Vision Cable supplemented its Form 393 filings on December 21, 1994, in response to the Commission's letter and telephone call which requested further clarification of its amended show-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Vision Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-36, 9 FCC Rcd 4119 (1994) (*"Second Order of Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Vision Cable implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Vision Cable's prices for the period after May 14, 1994 may be required to reflect the fact that Vision Cable's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

ing,[12] and on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[13]

III. DISCUSSION

6. Vision Cable asserts that its monthly price of $14.56 per subscriber for the Cable Service Tier is justified by its benchmark filing because its price is equal to the maximum permitted charge of $14.56 as calculated in the benchmark filing made on June 21, 1994. Vision Cable did not attempt to justify its monthly prices of $.60 per subscriber for the SuperStation Package and $3.50 per subscriber for the Preferred Service Package in the benchmark filing of June 21, 1994. In Vision Cable's amended filing of February 7, 1995, Vision Cable calculated maximum permitted prices of $12.56 for the Cable Service Tier and $2.17 for the SuperStation Package and the Preferred Service Package. However, upon review of the entire record, we have determined that Vision Cable has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Vision Cable's calculations in its June 21, 1994 Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Vision Cable did not correctly gross-up its tax entries. By placing entries in these columns, Vision Cable confirms that it is a tax-paying entity (*i.e.*, a "C" corporation). However, Vision Cable incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[14] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly adjusted tax entries.

b. In its calculations on Form 393, Part I, and Form 393, Part II, Worksheet 1, Vision Cable did not count as rate-regulated or as satellite channels eight channels that it offered as part of two *a la carte* packages of channels available either as packages or individually. The information before the Commission concerning Vision Cable's *a la carte* packages for the cable system serving CUID Nos. NC0016, NC0041, NC0140, and NC0692 shows that Vision Cable restructured its cable service offerings in these four franchise areas in the same manner that it restructured its cable services and prices in the system serving the City of Charlotte and Mecklenburg County, North Carolina, where we have determined that the channels in the SuperStation Package and Preferred Service Package should be treated as rate-regulated service tiers.[15] Prior to September 1, 1993, three of the channels in the SuperStation Package (WTBS, WOR, and WGN) were offered as part of the Basic Tier and one channel (TNT) was part of the Cable Service Tier. The four channels in the Preferred Service Package (Sci-Fi, The Comedy Channel, The Cartoon channel, and Country Music TV) were previously offered as a separate Preferred Service Tier. Consistent with the Commission's decision in the *Mecklenburg County* case, the SuperStation Package and the Preferred Service Package should have been treated as rate-regulated service tiers.[16] Vision Cable's *a la carte* offerings in this case are identical to the *Mecklenburg County* case, except in this case Vision Cable created the Preferred Service *a la carte* package using The Comedy Channel and The Cartoon Channel rather than the Comedy Central Channel and the SportsSouth Channel. The difference in the packages, however, is inconsequential, and the material facts are indistinguishable. Vision Cable's maximum permitted prices are therefore determined by including the eight channels of the SuperStation and Preferred Service Packages as additional CPS tiers, increasing the total rate-regulated channels from 32 to 40 and the total satellite channels from 26 to 34. This adjustment is consistent with the information that Vision Cable included in its amendment on February 7, 1995.

c. Vision Cable submitted additional information in response to the Commission's inquiry which revised upward the number of non-addressable converters leased to subscribers as of the initial date of regulation. This change caused corresponding increases in the gross book value of converters and other figures which must be reported on Form 393, Part III, Schedule C.[17] We have recalculated Schedule C (and

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[12] Letter from Gwendolyn G. Flowers, FCC, to Joel Reichard, Controller, Vision Cable of North Carolina, Inc. (Dec. 19, 1994); Letter from Joel Reichard to Gwendolyn G. Flowers, FCC (Dec. 21, 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

[14] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[15] *Vision Cable of North Carolina, Inc., Charlotte, North Carolina*, LOI 93-24, DA 94-1552 (Cab. Serv. Bur. released December 22, 1994) (*"Mecklenburg County"*). In the *Mecklenburg County* case, the SuperStation Package included three channels (WTBS, WOR, and WGN) that were offered before September 1, 1993 as part of the Basic Tier and one channel (TNT) that was offered previously as part of the Cable Service Tier. Vision Cable created the Preferred Service Package by including the same four channels (Sport South, Sci-Fi Channel, Comedy Central, and Country Music TV) previously offered as a separate Preferred Service Tier.

[16] *Id.*

[17] Letter from Gwendolyn G. Flowers, FCC, to Joel Reichard,

subsequent steps) to reflect Vision Cable's revised estimate of the number of non-addressable converter units leased to subscribers.

d. Vision Cable's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Vision Cable should have entered on line 104 the monthly equipment revenue figure it entered on Line 34 of Step G of Part III.[18] Accordingly, we have recalculated Worksheet 1 using the correct entry.

7. Because of these errors, we conclude that Vision Cable has failed to demonstrate that its prices for the CPS tiers were not unreasonable. We will therefore set prices for these tiers incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its amended Form 393, Vision Cable calculated the Inflation Adjustment Factor using data it relied on when it set its CPS prices. If based on this data Form 393 indicated that Vision Cable's prices were reasonable, then Vision Cable would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[19] However, Vision Cable has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Vision Cable should have filed Form 393 in each franchise area.[20] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992, 125.7 for the third quarter of 1993, and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate Inflation Adjustment Factors of 1.030 through October 1993 for CUID No. NC0016, 1.032 through November 1993 for CUID No. NC0140, and 1.034 through December 1993 for CUID Nos. NC0041 and NC0692.

8. These adjustments have the cumulative effect of reducing the maximum permitted monthly price for the Cable Service tier from $14.56 (as Vision Cable calculated in its benchmark filing on June 21, 1994) to the amounts set forth in Appendix B. These adjustments further result in the maximum permitted prices set forth in Appendix B for the SuperStation Package and the Preferred Service Package.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Vision Cable's showing supports the maximum reasonable CPS tier prices set forth in Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[21] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. We further conclude that Vision Cable must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Vision Cable's prices during the earlier period were unreasonable.[22] We reserve the right to make further adjustments to Vision Cable's prices for the period after May 14, 1994, upon completion of our review of Vision Cable's FCC Form 1200 rate filings.

11. We further conclude that Vision Cable has submitted in good faith a timely optional supplemental filing in response to ourDecember 29, 1994 Public Notice.[23] As provided in the Public Notice, we will relieve Vision Cable of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Vision Cable of Wilmington, Inc. in Wilmington, North Carolina, CUID No. NC0016; Wrightsville, North Carolina, CUID No. NC0041; New Hanover, North Carolina, CUID No. NC0140; and Navassa, North Carolina, CUID No. NC0692, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the benchmark filings submitted by Vision Cable of Wilmington, Inc. with respect to Wilmington, North Carolina, CUID No. NC0016; Wrightsville, North Carolina, CUID No. NC0041; New Hanover, North Carolina, CUID No. NC0140; and Navassa, North Carolina, CUID No. NC0692, for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justify the maximum prices in each

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Controller, Vision Cable of North Carolina, Inc. (Dec. 19, 1994); Letter from Joel Reichard to Gwendolyn G. Flowers, FCC (Dec. 21, 1994).

[18] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[19] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[20] See 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page II, requires that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." In general, a cable operator must submit a justification for its rates no more than 30 days after service of the earliest valid complaint. 47 C.F.R. § 76.956(a). The Inflation Adjustment Factor therefore must be calculated as if Vision Cable had filed Form 393 within this 30-day period.

[21] This finding is based solely on the representations of Vision Cable listed in paragraph 5, *supra* and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[22] We reviewed Vision Cable's FCC Form 1200 rate filings and confirmed that Vision calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[23] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

franchise area set forth in Appendix B (plus franchise fee) for Vision Cable of Wilmington, Inc.'s Cable Programming Service Tiers.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Vision Cable of Wilmington, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area 8(as set forth on Appendix A[24] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month and were thus unreasonable, offset in each franchise area by the amounts paid by each subscribers during the same period for Cable Programming Service Tiers which were less than the maximum permitted price, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED that Vision Cable of Wilmington, Inc. shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Vision Cable of Wilmington, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Wilmington, North Carolina, CUID No. NC0016; Wrightsville, North Carolina, CUID No. NC0041; New Hanover, North Carolina, CUID No. NC0140; and Navassa, North Carolina, CUID No. NC0692, for the period beginning May 15, 1994, to include the SuperStation Package and the Preferred Service Package as Cable Programming Service Tiers and to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum prices in each franchise area set forth in Appendix B (plus franchise fee).

17. IT IS FURTHER ORDERED that Vision Cable of Wilmington, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

18. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Vision Cable of Wilmington, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
NC0016	11/01/93	10/25/93
NC0041	01/03/94	12/30/93
NC0140	11/08/93	11/03/93
NC0692	01/03/94	12/28/93

Appendix B

Maximum Permitted Rates

CUID No.	Cable Service	SuperStation	Preferred Service
NC0016	$12.46	$2.17	$2.17
NC0041	$12.51	$2.18	$2.18
NC0140	$12.49	$2.17	$2.17
NC0692	$12.51	$2.18	$2.18

[24] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vision	CUID No. NC0279 (Cleveland
Cable	County, NC)
of Shelby, Inc.	NC0521 (Polkville, NC)
FCC Physical	NC0522 (Patterson Springs, NC)
System ID	NC0524 (Fallston, NC)
No.003972	NC0693 (Earl, NC)
	NC0694 (Grover, NC)
	NC0757 (Lattimore, NC)
	NC0816 (Mooresboro, NC)
	NC0839 (Belwood, NC)
	NC0843 (Casar, NC)

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Vision Cable of Shelby ("Vision Cable") was charging for its cable programming service ("CPS") tiers in Cleveland County, North Carolina, CUID No. NC0279; Polkville, North Carolina, CUID No. NC0521; Patterson Springs, North Carolina, CUID No. NC0522; Fallston, North Carolina, CUID No. NC0524; Earl, North Carolina, CUID No. NC0693; Grover, North Carolina, CUID No. NC0694; Lattimore, North Carolina, CUID No. NC0757; Mooresboro, North Carolina, CUID No. NC0816; Belwood, North Carolina, CUID No. NC0839; and Casar, North Carolina, CUID No. NC0843. Vision Cable has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Vision Cable's prices only through May 14, 1994. As discussed below and based on the entire record before the Commission in this proceeding, we conclude that the CPS prices in effect for the period under review are not justified under the benchmark showing. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints for the franchise areas addressed in this order were completed and served on Vision Cable and received by the Commission on the dates set forth in Appendix A.

5. Vision Cable submitted its initial CPS price justification for each of the franchise areas addressed in this order through identical FCC Forms 393 filed on January 18, 1994. Vision Cable supplemented its filings on June 21, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[11] by submitting a system-wide filing that included

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Vision Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-36, 9 FCC Rcd 4119 (1994) (*"Second Order of Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Vision Cable implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Vision Cable's prices for the period after May 14, 1994 may be required to reflect the fact that Vision Cable's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

each franchise area in which a complaint was pending. The record indicates that the CUIDs addressed here constitute ten separate franchise areas but are served through a single cable system, that Vision Cable charges the same prices for all rate-regulated cable services and associated equipment in each franchise area, and that Vision Cable offers the same channel line-ups in all ten areas. Because there are no significant distinctions among Vision Cable's services and rates in these ten areas, we will permit these rates to be justified through a single Form 393 filing. Vision Cable supplemented its Form 393 filings on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. Vision Cable asserts that its monthly price of $11.75 per subscriber for the Cable Service Tier is justified by its benchmark filing because its price is equal to the maximum permitted charge of $11.75 as calculated in the benchmark filing made on June 21, 1994. Vision Cable did not attempt to justify its monthly prices of $.60 per subscriber for the SuperStation Package and $3.50 per subscriber for the Preferred Service Package in the benchmark filing of June 21, 1994. In Vision Cable's amended filing of February 7, 1995, Vision Cable calculated maximum permitted prices of $12.83 for the Cable Service Tier and $2.33 for the SuperStation Package and $1.75 for the Preferred Service Package. However, upon review of the entire record, we have determined that Vision Cable has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Vision Cable's calculations in its June 21, 1994 Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Vision Cable did not correctly gross-up its tax entries. By placing entries in these columns, Vision Cable confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Vision Cable incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[13] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly adjusted tax entries.

b. In its calculations on Form 393, Part I, and Form 393, Part II, Worksheet 1, Vision Cable did not count as rate-regulated or as satellite channels seven channels that it offered as part of two *a la carte* packages of channels available either as packages or individually. The information before the Commission concerning Vision Cable's *a la carte* packages for the cable system serving CUID Nos. NC0279, NC0521, NC0522, NC0524, NC0693, NC0694, NC0757, NC0816, NC0839, and NC0843 shows that Vision Cable restructured its cable service offerings in these ten franchise areas in the same manner that it restructured its cable services and prices in the system serving the City of Charlotte and Mecklenburg County, North Carolina, where we have determined that the channels in the SuperStation Package and Preferred Service Package should be treated as rate-regulated service tiers.[14] Prior to September 1, 1993, three of the channels in the SuperStation Package (WTBS, WOR, and WGN) were offered as part of the Basic Tier and one channel (TNT) was part of the Cable Service Tier; the channels in the Preferred Service Package (SportsSouth, Sci-Fi, and Country Music TV) were previously offered as part of a separate Preferred Service Tier. Consistent with the Commission's decision in the *Mecklenburg County* case, the SuperStation Package and the Preferred Service Package should have been treated as rate-regulated service tiers.[15] Vision Cable's *a la carte* offerings in this case are identical to the *Mecklenburg County* case, except in this case Vision Cable's Preferred Service *a la carte* package contained only three channels rather than four channels. The difference in the packages, however, is inconsequential and the material facts are indistinguishable. Vision Cable's maximum permitted prices are therefore determined by including the seven channels of the SuperStation and Preferred Service Packages as additional CPS tiers, increasing the total rate-regulated channels from 31 to 38 and the total satellite channels from 19 to 26. This adjustment is consistent with the information that Vision Cable included in its amendment on February 7, 1995.

c. Vision Cable submitted additional information in response to the Commission's inquiry which revised upward the number of non-addressable converters

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[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

[13] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[14] *Vision Cable of North Carolina, Inc., Charlotte, North Carolina*, LOI 93-24, DA 94-1552 (Cab. Serv. Bur. released December 22, 1994) (*"Mecklenburg County"*). In the *Mecklenburg County* case, the SuperStation Package included three channels (WTBS, WOR, and WGN) that were offered before September 1, 1993 as part of the Basic Tier and one channel (TNT) that was offered previously as part of the Cable Service Tier. Vision Cable created the Preferred Service Package by including the same four channels (Sport South, Sci-Fi Channel, Comedy Central, and Country Music TV) previously offered as a separate Preferred Service Tier.

[15] *Id.*

leased to subscribers as of the initial date of regulation. This change caused corresponding increases in the gross book value of converters and other figures which must be reported on Form 393, Part III, Schedule C.[16] We have recalculated Schedule C (and subsequent steps) to reflect Vision Cable's revised estimate of the number of non-addressable converter units leased to subscribers.

d. Vision Cable's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Vision Cable should have entered on line 104 the monthly equipment revenue figure it entered on Line 34 of Step G of Part III.[17] Accordingly, we have recalculated Worksheet 1 using the correct entry.

7. Because of these errors, we conclude that Vision Cable has failed to demonstrate that its prices for the CPS tiers were not unreasonable. We will therefore set prices for these tiers incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its amended Form 393, Vision Cable calculated the Inflation Adjustment Factor using data it relied on when it set its CPS prices. If based on this data Form 393 indicated that Vision Cable's prices were reasonable, then Vision Cable would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[18] However, Vision Cable has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Vision Cable timely filed Form 393 in each franchise area.[19] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.034 through December 1993.

8. These adjustments have the cumulative effect of reducing the maximum permitted monthly price for the Cable Service Tier from $11.75 (as Vision Cable calculated in the benchmark filing on June 21, 1994) to $10.05. These adjustments further result in maximum permitted prices of $2.23 for the SuperStation Package and $1.68 for the Preferred Service Package.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Vision Cable's showing supports maximum reasonable CPS tier prices of $10.05 for the Cable Service Tier, $2.23 for the SuperStation Package, and $1.68 for the Preferred Service Package, (plus franchise fees), for the period from January 3, 1994 to May 14, 1994.[20] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. We further conclude that Vision Cable must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Vision Cable's prices during the earlier period were unreasonable.[21] We reserve the right to make further adjustments to Vision Cable's prices for the period after May 14, 1994, upon completion of our review of Vision Cable's FCC Form 1200 rate filings.

11. We further conclude that Vision Cable has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[22] As provided in the Public Notice, we will relieve Vision Cable of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this order.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Vision Cable of Shelby, Inc. in Cleveland County, North Carolina, CUID No. NC0279; Polkville, North Carolina, CUID No. NC0521; Patterson Springs, North Carolina, CUID No. NC0522; Fallston, North Carolina, CUID No. NC0524; Earl, North Carolina, CUID No. NC0693; Grover, North Carolina, CUID No. NC0694; Lattimore, North Carolina, CUID No. NC0757; Mooresboro, North Carolina,. CUID No. NC0816; Belwood, North Carolina, CUID No. NC0839; and Casar, North Carolina, CUID No. NC0843, and all other complaints in these franchise areas related to the same prices. ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the benchmark filings submitted by Vision Cable of Shelby, Inc. with respect to Cleveland County, North Carolina, CUID No. NC0279; Polkville, North Carolina, CUID No. NC0521; Patterson Springs, North Carolina, CUID No. NC0522; Fallston, North Carolina, CUID No. NC0524; Earl, North Carolina, CUID No. NC0693; Grover, North Carolina, CUID No. NC0694; Lattimore, North Carolina, CUID No. NC0757; Mooresboro, North Carolina, CUID No. NC0816;

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[16] Letter from Gwendolyn G. Flowers, FCC, to Joel Reichard, Controller, Vision Cable of North Carolina, Inc. (Dec. 19, 1994); Letter from Joel Reichard to Gwendolyn G. Flowers, FCC (Dec. 21, 1994).

[17] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[18] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[19] See 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[20] This finding is based solely on the representations of Vision Cable listed in paragraph 5, *supra* and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[21] We reviewed Vision Cable's FCC Form 1200 rate filings and confirmed that Vision calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[22] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

Belwood, North Carolina, CUID No. NC0839; and Casar, North Carolina, CUID No. NC0843, for the period beginning January 3, 1994 and ending on May 14, 1994 justify maximum monthly prices for Vision Cable of Shelby, Inc.'s Cable Programming Service Tiers of $10.05 (plus franchise fee) for the Cable Service Tier , $2.23 (plus franchise fee) for the SuperStation Package, and $1.68 (plus franchise fee) for the Preferred Service Package.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Vision Cable of Shelby, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service for the period from January 3, 1994 to May 14, 1994 which exceeded $10.05 per month (plus franchise fee) for the Cable Service Tier and $2.23 per month (plus franchise fee) for the SuperStation Package and were thus unreasonable, offset in each franchise area by the amounts paid by each subscribers during the same period for cable programming service tiers which were less than the maximum permitted price, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED that Vision Cable of Shelby, Inc. shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.*

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Vision Cable of Shelby, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Cleveland County, North Carolina, CUID No. NC0279; Polkville, North Carolina, CUID No. NC0521; Patterson Springs, North Carolina, CUID No. NC0522; Fallston, North Carolina, CUID No. NC0524; Earl, North Carolina, CUID No. NC0693; Grover, North Carolina, CUID No. NC0694; Lattimore, North Carolina, CUID No. NC0757; Mooresboro, North Carolina, CUID No. NC0816; Belwood, North Carolina, CUID No. NC0839; and Casar, North Carolina, CUID No. NC0843, for the period beginning May 15, 1994, to include the SuperStation Package and the Preferred Service Package as Cable Programming Service tiers and to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price for these franchise areas (plus franchise fee).

17. IT IS FURTHER ORDERED that Vision Cable of Shelby, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

18. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Vision Cable of Shelby, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
NC0279	01/03/94	12/28/93
NC0521	01/03/94	12/28/93
NC0522	01/03/94	12/28/93
NC0524	01/03/94	12/28/93
NC0693	01/03/94	12/30/93
NC0694	01/03/94	12/28/93
NC0757	01/03/94	12/28/93
NC0816	01/03/94	12/28/93
NC0839	01/03/94	12/28/93
NC0843	01/03/94	12/28/93

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vision Cable	CUID No. FL0492 (Clearwater, FL)
of Pinellas	FL0493 (Belleair, FL)
Clearwater, Florida	FL0538 (Pinellas County, FL)
	FL0580 (St. Petersburg, FL)
	FL0650 (Pinellas Park, FL)
	FL0766 (Seminole, FL)

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Vision Cable of Pinellas ("Vision Cable") was charging for its cable programming service ("CPS") tier in Florida for CUID Nos. FL0492, FL0493, FL0538, FL0580, FL0650, and FL0766. Vision Cable has attempted to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Vision Cable's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints for the franchise areas addressed in this Order were completed and served on Vision Cable and received by the Commission on the dates set forth in Appendix A.

5. Vision Cable attempted to justify its CPS price through an initial FCC Form 393 filed on November 15, 1993 for Clearwater, Florida (CUID No. FL0492). Vision Cable also made identical benchmark filings for the Belleair, Florida (CUID No. FL0493) on January 14, 1994; Pinellas County, Florida (CUID No. FL0538) on January 14, 1994 and March 21, 1994; Kenneth City, Florida (CUID No. FL0580) on November 15, 1993; Pinellas Park County, Florida (CUID No. FL0650) on November 15, 1993, January 14, 1994, March 21, 1994, and April 1, 1994; and Seminole, Florida (CUID No. FL0766) on January 14, 1994. Vision Cable amended its justification on June 21, 1994 for each of the franchise areas in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[11]

III. DISCUSSION

6. Vision Cable asserts that its monthly CPS tier price of $10.81 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $10.81 as calculated in its most recent amended filing dated June 21, 1994. Upon review of Vision Cable's Form 393, we have found no apparent errors that would require a recalculation of Vision Cable's maximum permitted CPS prices.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Vision Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (" *Second Order on Reconsideration")*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Vision Cable implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Vison Cable's showing supports a maximum reasonable CPS tier price of $10.81 per month (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) through May 14, 1994.[12]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced in Appendix A against the cable programming service price charged by Vision Cable of Pinellas in Clearwater, Florida (CUID No. FL0492); Belleair, Florida (CUID FL0493); Pinellas County, Florida (CUID No. FL0538); Kenneth City, Florida (CUID No. FL0580); Pinellas Park, Florida (CUID No. FL0650); and Seminole, Florida (CUID No. FL0766), and all other complaints in these franchise areas relating to the same price, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Vision Cable of Pinellas with respect to Clearwater, Florida (CUID No. FL0492); Belleair, Florida (CUID FL0493); Pinellas County, Florida (CUID No. FL0538); Kenneth City, Florida (CUID No. FL0580); Pinellas Park, Florida (CUID No. FL0650); and Seminole, Florida (CUID No. FL0766) for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994, justifies a maximum price of $10.81 per month (plus franchise fee) for Vision Cable of Pinellas' Cable Programming Service Tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregorgy J. Vogt
Deputy Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
FL0492	10/08/93	10/05/93
FL0493	12/21/93	12/20/93
FL0538	12/21/93	12/20/93
FL0580	10/14/93	10/07/93
FL0650	11/22/93	11/08/93
FL0766	12/22/93	12/21/93

[12] This finding is based solely on the representations of Vision Cable listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Service Electric Company	CUID Nos. NJ0057,
Service Electric Cablevision, Inc.	NJ0058, NJ0059,
Service Electric Cable T.V., Inc.	NJ0538, PA0215,
Service Electric Cable	PA0478, PA0479,
T.V. of New Jersey, Inc.	PA0484, PA0846, PA0921

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the prices Service Electric Company, Service Electric Cablevision, Inc., Service Electric Cable T.V., Inc., and Service Electric Cable T.V. of New Jersey, Inc. (collectively "Service Electric") were charging for their cable programming service ("CPS") tiers in the communities listed in the attached Appendix (the "subject communities"). The complaints must be dismissed because they concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against Service Electric, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. The complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation.[3] CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. Service Electric filed motions to dismiss the complaints on the ground that it offers only a single, basic tier of service in each of the subject communities. In support of this assertion, Service Electric submitted channel line-up cards and declarations under penalty of perjury from system managers and other responsible officials.

4. The complaints under consideration here were filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaints and Service Electric's responses, and we conclude that the complaints challenge only basic rates, not CPS rates. Although the complainants indicate that the rates challenged violate the Commission's rules, the specific information provided by the complainants indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaints do in fact challenge CPS rates, the complainants may file a petition for reconsideration providing information adequate to support their challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaints filed against the cable programming service prices charged by Service Electric Company, Service Electric Cablevision, Inc., Service Electric Cable T.V., Inc., and Service Electric Cable T.V. of New Jersey, Inc. in the communities listed in the attached Appendix ARE DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).
[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.
[3] Cable Act of 1992, Section 623, 47 U.S.C. § 543(a)(1).
[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

APPENDIX

CUID No.	Community
NJ0057	Byram Township, New Jersey
NJ0058	Franklin, New Jersey
NJ0059	Hamburg, New Jersey
NJ0538	Branchville, New Jersey
PA0215	Exeter Township, Pennsylvania
PA0478	Allentown, Pennsylvania
PA0479	Bethlehem, Pennsylvania
PA0484	Tamaqua, Pennsylvania
PA0846	Hanover Township, Pennsylvania
PA0921	Penn Argyl, Pennsylvania

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vision Cable	CUID No. NC0015 (Salisbury, NC)
of Salisbury, Inc.	NC0158 (Spencer, NC)
Physical System	NC0285 (East Spencer, NC)
ID No. 003092	NC0385 (Rowan County, NC)
	NC0407 (Granite Quarry, NC)
	NC0676 (Faith, NC)
	NC0677 (Rockwell, NC)
	NC0754 (Cleveland, NC)

Benchmark Filing To Support
Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Vision Cable of Salisbury, Inc. ("Vision Cable") was charging for its Cable Programming Service ("CPS") Tiers in North Carolina, for CUID Nos. NC0015, NC0158, NC0285, NC0385, NC0407, NC0676, NC0677, and NC0754. Vision Cable has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Vision Cable's prices only through May 14, 1994. As discussed below and based on the entire record before the Commission in this proceeding, we conclude that the CPS prices in effect for the period under review are not justified under the benchmark showing. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints for the franchise areas addressed in this Order were completed and served on Vision Cable and received by the Commission on the dates set forth in Appendix A.

5. Vision Cable submitted its initial CPS price justification through an FCC Form 393 filed on November 22, 1993 in response to the earliest valid complaint filed with the Commission for Salisbury, North Carolina (CUID No. NC0015). Vision Cable submitted identical benchmark justifications in response to complaints for each of the other franchise areas included in this Order on January 24, 1994. Vision Cable supplemented its filings on June 21, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[11] by submitting a system-wide filing that included each franchise area in which a complaint was pending. The record indicates that the CUIDs addressed here constitute eight separate franchise areas but are served through a single cable system, that Vision Cable charges the same prices for all rate-regulated cable services and associated equipment

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Vision Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-36, 9 FCC Rcd 4119 (1994) (*"Second Order of Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Vision Cable implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Vision Cable's prices for the period after May 14, 1994 may be required to reflect the fact that Vision Cable's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

in each franchise area, and that Vision Cable offers the same channel line-ups in all eight areas. Because there are no significant distinctions among Vision Cable's services and rates in these eight areas, we will permit these rates to be justified through a single Form 393 filing. Vision Cable supplemented its Form 393 filings on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. Vision Cable asserts that its monthly price of $11.76 per subscriber for the Cable Service Tier is justified by its benchmark filing because its price is equal to the maximum permitted charge of $11.76 as calculated in the benchmark filing made on June 21, 1994. Vision Cable did not attempt to justify its monthly prices of $.60 per subscriber for the SuperStation Package and $3.50 per subscriber for the Preferred Service Package in its benchmark filing of June 21, 1994. In Vision Cable's amended filing of February 7, 1995, Vision Cable calculated maximum permitted prices of $10.96 for the Cable Service Tier, $2.19 for the SuperStation Package and $1.64 for the Preferred Service Package. However, upon review of the entire record, we have determined that Vision Cable has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Vision Cable's calculations in its Form 393 filed on June 21, 1994:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Vision Cable did not correctly gross-up its tax entries. By placing entries in these columns, Vision Cable confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Vision Cable incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[13] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly adjusted tax entries.

b. In its calculations on Form 393, Part I, and Form 393, Part II, Worksheet 1, Vision Cable did not count as rate-regulated or as satellite channels seven channels that it offered as part of two *a la carte* packages of channels available either as packages or individually. The information before the Commission concerning Vision Cable's *a la carte* packages for the cable system serving CUID Nos. NC0015, NC0158, NC0285, NC0385, NC0407, NC0676, NC0677, and NC0754 shows that Vision Cable restructured its cable service offerings in these eight franchise areas in the same manner that it restructured its cable services and prices in the system serving the City of Charlotte and Mecklenburg County, North Carolina, where we have determined that the channels in the SuperStation Package and Preferred Service Package should be treated as rate-regulated service tiers.[14] Prior to September 1, 1993, three of the channels in the SuperStation Package (WTBS, WOR, and WGN) were offered as part of the Basic Tier and one channel (TNT) was part of the Cable Service Tier; the three channels in the Preferred Service Package (Sport South, Sci-Fi, and Country Music TV) were previously offered as part of a separate Preferred Service Tier. The fourth channel on the Preferred Service Tier, Video Hits #1, was moved to the Cable Service Tier effective September 1, 1993. Consistent with the Commission's decision in the *Mecklenburg County* case, the SuperStation Package and the Preferred Service Package should have been treated as rate-regulated service tiers.[15] Vision Cable's *a la carte* offerings in this case are identical to the *Mecklenburg County* case, except in this case Vision Cable included only 3 of the 4 channels previously offered on the Preferred Service Tier to create the Preferred Service *a la carte* package and moved the fourth channel to the Cable Service Tier. The difference in the packages, however, is inconsequential and the material facts are indistinguishable. Vision Cable's maximum permitted prices are therefore determined by including the seven channels of the SuperStation and Preferred Service Packages as additional CPS tiers, increasing the total rate-regulated channels from 32 to 39 and the total satellite channels from 20 to 27. This adjustment is consistent with the information that Vision Cable included in its amendment filed on February 7, 1995.

c. Vision Cable submitted additional information in response to the Commission's inquiry which revised upward the number of non-addressable converters

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[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

[13] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[14] *Vision Cable of North Carolina, Inc., Charlotte, North Carolina*, LOI 93-24, DA 94-1552 (Cab. Serv. Bur. released December 22, 1994) (*"Mecklenburg County"*). In the *Mecklenburg County* case, the SuperStation Package included three channels (WTBS, WOR, and WGN) that were offered before September 1, 1993 as part of the Basic Tier and one channel (TNT) that was offered previously as part of the Cable Service Tier. Vision Cable created the Preferred Service Package by including the same four channels (Sport South, Sci-Fi Channel, Comedy Central, and Country Music TV) previously offered as a separate Preferred Service Tier.

[15] *Id.*

leased to subscribers as of the initial date of regulation. This change caused corresponding increases in the gross book value and other figures which must be reported 8on Form 393, Part III, Schedule C.[16] We have recalculated Schedule C (and subsequent steps) to reflect Vision Cable's revised estimate of the number of non-addressable converter units leased to subscribers.

d. Vision Cable's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Vision Cable should have entered on line 104 the monthly equipment revenue figure it entered on Line 34 of Step G of Part III.[17] Accordingly, we have recalculated Worksheet 1 using the correct entry.

7. Because of these errors, we conclude that Vision Cable has failed to demonstrate that its prices for the CPS tiers were not unreasonable. We will therefore set prices for these tiers incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its amended Form 393, Vision Cable calculated the Inflation Adjustment Factor using data it relied on when it set its CPS prices. If based on this data Form 393 indicated that Vision Cable's prices were reasonable, then Vision Cable would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[18] However, Vision Cable has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Vision Cable filed Form 393 in each franchise area.[19] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992, 125.7 for the third quarter of 1993, and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.030 through October 1993 for CUID No. NC0015 and 1.034 through December 1993 for CUID Nos. NC0158, NC0285, NC0385, NC0407, NC0676, NC0677, and NC0754.

8. These adjustments have the cumulative effect of reducing the maximum permitted monthly price for the Cable Service Tier from $11.76 (as Vision Cable calculated in its benchmark filing on June 21, 1994) to the amounts set forth in Appendix B. These adjustments further result in the maximum permitted prices set forth in Appendix B for the SuperStation Package and the Preferred Service Package.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Vision Cable's showing supports the maximum reasonable CPS tier pricesset forth in Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[20] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. We further conclude that Vision Cable must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Vision Cable's prices during the earlier period were unreasonable.[21] We reserve the right to make further adjustments to Vision Cable's prices for the period after May 14, 1994, upon completion of our review of Vision Cable's FCC Form 1200 rate filings.

11. We further conclude that Vision Cable has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[22] As provided in the Public Notice, we will relieve Vision Cable of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Vision Cable of Salisbury, Inc. in Salisbury, North Carolina, CUID No. NC0015; Spencer, North Carolina, CUID No. NC0158; East Spencer, North Carolina, CUID No. NC0285; Rowan County, North Carolina, CUID No. NC0385; Granite Quarry, North Carolina, CUID No. NC0407; Faith, North Carolina, CUID No. NC0676; Rockwell, North Carolina, CUID No. NC0677; and Cleveland, North Carolina, CUID No. NC0754 ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the benchmark filings submitted by Vision Cable of Salisbury, Inc. with respect to Salisbury, North Carolina, CUID No. NC0015; Spencer, North Carolina, CUID No. NC0158; East Spencer, North Carolina, CUID No. NC0285; Rowan County, North Carolina, CUID No. NC0385; Granite Quarry, North Carolina, CUID No. NC0407; Faith, North Carolina, CUID No. NC0676; Rockwell, North Carolina, CUID No. NC0677; and Cleveland, North Carolina, CUID No. NC0754, for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justify the

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[16] Letter from Gwendolyn G. Flowers, FCC, to Joel Reichard, Controller, Vision Cable of North Carolina, Inc. (Dec. 19, 1994); Letter from Joel Reichard to Gwendolyn G. Flowers, FCC (Dec. 21, 1994).

[17] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[18] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[19] See 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[20] This finding is based solely on the representations of Vision Cable listed in paragraph 5, *supra* and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[21] We reviewed Vision Cable's FCC Form 1200 rate filings and confirmed that Vision calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[22] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

maximum prices in each franchise area set forth in Appendix B (plus franchise fee) for Vision Cable of Salisbury, Inc.'s Cable Programming Service Tiers.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Vision Cable of Salisbury, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[23] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month and were thus unreasonable, offset in each franchise area by the amounts paid by each subscribers during the same period for cable programming service tiers which were less than the maximum permitted price, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED that Vision Cable of Salisbury, Inc. shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Vision Cable of Salisbury, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Salisbury, North Carolina, CUID No. NC0015; Spencer, North Carolina, CUID No. NC0158; East Spencer, North Carolina, CUID No. NC0285; Rowan County, North Carolina, CUID No. NC0385; Granite Quarry, North Carolina, CUID No. NC0407; Faith, North Carolina, CUID No. NC0676; Rockwell, North Carolina, CUID No. NC0677; and Cleveland, North Carolina, CUID No. NC0754, for the period beginning May 15, 1994, to include the SuperStation Package and the Preferred Service Package as Cable Programming Service tiers and to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum prices in each franchise area set forth in Appendix B (plus franchise fee).

17. IT IS FURTHER ORDERED that Vision Cable of Salisbury, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

18. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Vision Cable of Salisbury, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
NC0015	10/29/93	10/18/93
NC0158	01/04/94	12/29/93
NC0285	01/04/94	12/23/93
NC0385	01/04/94	12/23/93
NC0407	01/04/94	12/23/93
NC0676	01/04/94	12/28/93
NC0677	01/04/94	12/28/93
NC0754	01/04/94	12/23/93

Appendix B

Maximum Permitted Rates

CUID No.	Cable Service	SuperStation	Preferred Service
NC0015	$10.90	$2.18	$1.64
NC0158	$10.95	$2.19	$1.64
NC0285	$10.95	$2.19	$1.64
NC0385	$10.95	$2.19	$1.64
NC0407	$10.95	$2.19	$1.64
NC0676	$10.95	$2.19	$1.64
NC0677	$10.95	$2.19	$1.64
NC0754	$10.95	$2.19	$1.64

[23] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 27, 1995

Released: February 28, 1995

Brenda L. Fox, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, NW
Washington, DC 20037-1194

re: Request for Deferral of Action:
Binghamton NewChannels; Vision Cable
Television Co., Inc.; Vision Cable of
North Carolina, Inc.; Lincoln Cablevision

Dear Ms. Fox:

On January 17, 1995, you wrote on behalf of the above-referenced companies to request a deferral of Commission action on complaints regarding the cable programming service ("CPS") rates of these companies pending the Commission's resolution of pending applications for review of Letter of Inquiry ("LOI") rulings on a la carte issues. You note that you believe the Bureau's LOI rulings were erroneous, that deferral of action will produce no harm to subscribers, and that the issues raised are novel and require the Commission's attention. Further, you state, action on the CPS rate complaints could produce irreparable harm and unnecessary burden to these cable operators.

While we are denying your request that we defer action on CPS rate complaints against these companies, we have considered your arguments, and believe it would be appropriate to stay the effectiveness of any action pursuant to our orders with respect to those complaints (including the running of any time periods set forth in those orders) until the Commission releases a decision on the applications for review of the Bureau's LOI decisions regarding the treatment of the relevant a la carte packages. If the Commission affirms the Bureau's LOI decision, any CPS rate orders that impose refund liability on these companies will become effective upon the release of the Commission's decision and all time periods set forth therein shall begin to run. If the Commission releases an Order that reverses or modifies the Bureau's LOI decision in a way that requires adjustments to the maximum permitted rates calculated in the rate orders, the rate orders will be modified by the Commission Order.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLEVISION OF BOSTON LIMITED PARTNERSHIP — LOI-93-12

Petition for Stay
Pending Reconsideration of
Order on Letter of Inquiry

ORDER

Adopted: February 24, 1995; Released: February 28, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On February 16, 1995, Cablevision of Boston Limited Partnership ("Cablevision"), filed a Petition for Stay Pending Reconsideration by the Cable Services Bureau of the *Memorandum Opinion and Order* issued in the Letter of Inquiry proceeding concerning Cablevision.[1] The *LOI Order* requires Cablevision to restructure its service offerings on or before March 22, 1995, to treat the channels composing its Family Cable package as rate-regulated channels. Cablevision filed a Petition for Reconsideration of the Order on January 23, 1995. In the instant Petition, Cablevision seeks a stay of the *LOI Order* pending the resolution of its Petition for Reconsideration. For the reasons set forth below, we grant Cablevision's Petition for Stay.

II. BACKGROUND

2. The Commission received a copy of a letter dated September 9, 1993, from the Office of Cable Communications of the City of Boston, Massachusetts, to Cablevision alleging that Cablevision violated Commission regulations governing cable television service. In response to this complaint, the Commission issued Letter of Inquiry 93-12 ("LOI") to Cablevision on November 17, 1993.[2] The LOI asked Cablevision to provide information concerning, among other issues, its compliance with the Commission's rules governing rate and service changes for regulated cable services.[3] Cablevision responded to our LOI by letter dated December 16, 1993.

3. Based on the information submitted by Cablevision, the Bureau found that Cablevision's Family Cable package, as the offering existed in Boston, Massachusetts, on November 17, 1993, the date of the Commission's Letter of Inquiry, was not exempt from regulation.[4] As a result, the Bureau ordered Cablevision to either (1) offer the channels composing Cablevision's Family Cable package as part of the respective rate-regulated tiers in which they were offered prior to September 1, 1993, or (2) offer the channels collectively as a separate rate-regulated tier of cable programming service. In addition, the Bureau ordered the channels to be counted by Cablevision as rate-regulated channels as of September 1, 1993, for purposes of rate justification.[5]

4. On January 23, 1995, Cablevision filed a Petition for Reconsideration of the *LOI Order*. In its Petition for Reconsideration, Cablevision stated that it restructured its Family Cable package in July 1994. The Bureau sent a letter requesting additional information to Cablevision on February 3, 1995, to enable the Bureau to "evaluate the status of the offering after July 1994."[6] Cablevision has not yet responded to the Bureau's letter.[7] Subsequently, Cablevision filed the instant Petition for Stay. No opposition to the Petition is on file.

III. DISCUSSION

5. The Commission evaluates petitions for stay under well-settled principles. To support a stay, petitioners must demonstrate: (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[8] As described below, resolution of this particular stay rests mainly on the strength of Cablevision's argument concerning the second prong of this test.

6. Cablevision claims that it will suffer irreparable injury if it is required to comply with the Bureau's *LOI Order*, since it would be required to "dismantle" its restructured Family Cable package, restructure its rates for its basic and cable programming services tiers, and provide subscribers with advance notice of all rate and service changes. In addition to subjecting Cablevision to possible refund liability for the time period during which the initial Family Cable package was offered (i.e., September 1, 1993, to July

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[1] Cablevision of Boston Limited Partnership, Memorandum Opinion and Order, LOI-93-12, DA 94-1549 (Cab. Serv. Bur., released Dec. 22, 1994) (*"LOI Order"*).

[2] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Henry J. Ferris, General Manager, Cablevision of Boston, LOI 93-12 (November 17, 1993).

[3] The LOI also requested information concerning proper notice of rate increases and programming changes provided by Cablevision, and its compliance with regulations governing the Commission's cable rate freeze. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994).

[4] *LOI Order* at ¶22.

[5] *Id.* at ¶ ¶23 and 24.

[6] *See* Letter from Meredith J. Jones, Chief, FCC Cable Services Bureau, to Christopher J. Harvie, Esq., Counsel for Cablevision (February 3, 1995).

[7] The Letter requires Cablevision to provide the specified information within 30 days of the date of the letter. *Id.*

[8] *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

1994). Cablevision suggests that the *LOI Order* subjects it possible refund liability for the period of time in which its restructured Family Cable package was offered as a non-rate regulated offering. In the event Cablevision's Petition for Reconsideration is successful on the merits, Cablevision asserts that its financial losses would be unrecoverable. Cablevision also argues that a stay is warranted in this case because the Commission is still in the process of gathering information relevant to assessing the regulatory status of the Family Cable package in its present form.

7. We grant the stay requested by Cablevision pending resolution of its Petition for Reconsideration of the *LOI Order*. We conclude that a stay of our own order is appropriate under these circumstances since the Bureau has an outstanding request for additional information regarding Cablevision's Family Cable offering, which was restructured subsequent to its response to the Commission's Letter of Inquiry. A response to this request is not due until March 6, 1995. In light of the potential irreparable harm which could result if Cablevision is required torestructure its service offerings before the Bureau has completed its current inquiry, we find that a stay of our own order best serves the public interest.

8. Accordingly, IT IS ORDERED that the *Memorandum Opinion and Order* issued in Letter of Inquiry proceeding No. LOI-93-12 is STAYED pending the resolution of Cablevision's Petition for Reconsideration. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies — Transmittal No. 700

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: February 27, 1995; Released: February 27, 1995

By the Deputy Chief, Tariff Division, Common Carrier Bureau:

1. On September 30, 1994, Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 700 to introduce new term pricing plan discounts for the following selected DS1 and DS3 switched transport services: switched transport entrance facilities; direct trunk transport; and multiplexing. Bell Atlantic does not propose to make any of its term pricing plan discounts available for customers of tandem switched transport.

2. On October 25, 1994, WilTel, Inc. (WilTel) and The Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Transmittal No. 700. The petitioners argue that Bell Atlantic failed to provide sufficient cost support for the transmittal and that it discriminates against tandem switched transport customers. CompTel argues that because Bell Atlantic's cost study for Transmittal No. 700 shows no unit cost differences between providing one DS3 and three DS3s, the Commission should not permit Bell Atlantic to establish rate categories for multiple DS3s.[1] CompTel and WilTel argue that Bell Atlantic's proposal is discriminatory to smaller carriers because term discounts are available for DS1 and DS3 service for direct-trunked transport but not for tandem-switched transport, and larger discounts are offered for DS3 customers than for DS1 customers.[2]

3. In its reply, filed November 4, 1994, Bell Atlantic maintains that the rates in Transmittal No. 700 extend to switched transport service the identical term plans as are currently in effect for special access services.[3] Bell Atlantic, citing the *Virtual Collocation Order*,[4] contends that its transmittal is based on specific Commission approval of volume and term discounts for switched transport.[5] Bell Atlantic further contends that this proposal meets the new services test under the price cap rules, and does not discriminate.[6]

4. Bell Atlantic filed Special Permission Application No. 235 on February 17, 1995, to modify material filed in Transmittal No. 700. In this application, Bell Atlantic proposes to allow the term pricing plan established in this transmittal only for the Washington D.C. study area, where it claims to have 126 operational DS1-equivalent switched transport cross-connects. Bell Atlantic also seeks permission to advance the scheduled effective date of Transmittal No. 700 from April 1, 1995 to February 28, 1995. Bell Atlantic notes that it has not yet met the threshold for offering volume and term discounts in any of its other study areas.[7]

5. The Tariff Division has reviewed Bell Atlantic's Transmittal No. 700, Application No. 235, and the related pleadings. We conclude that no compelling argument has been presented that this tariff, as revised, is patently unlawful so as to warrant rejection or that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate Bell Atlantic's revisions to Tariff F.C.C. No. 1, Transmittal No. 700, filed by WilTel, Inc. and The Competitive Telecommunications Association, ARE DENIED.

7. IT IS FURTHER ORDERED that Application No. 235, filed on February 17, 1995, by Bell Atlantic Telephone Companies IS GRANTED. This will enable Bell Atlantic to file the tariff material requested therein to be effective on not less than one day's notice.

8. IT IS FURTHER ORDERED that for this purpose, Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived. Bell Atlantic should cite the "DA" number of this order as the authority for this filing.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Deputy Chief, Tariff Division
Common Carrier Bureau

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[1] CompTel Petition at 4-5.
[2] WilTel Petition at 6-7; CompTel Petition at 3-5.
[3] Bell Atlantic Reply at 1.
[4] Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5202 (1994) (*Virtual Collocation Order*).
[5] Bell Atlantic Reply at 2.
[6] *Id.* at 3-4.
[7] *See* Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7434-35 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG BEACH ACQUISITION CORP., d/b/a CABLEVISION INDUSTRIES

Appeal of Local Rate Order of the City of Long Beach, California

ORDER

Adopted: February 27, 1995; Released: February 28, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On August 31, 1994, Cablevision Industries ("CVI") filed an Appeal and an Ex Parte Petition for Stay of Enforcement pending Commission review of the local rate order, adopted on August 16, 1994 by the City of Long Beach, California ("the City") and pending resolution of a Letter of Inquiry ("LOI") issued by the Commission to CVI, regarding its a la carte package offerings in Long Beach.[1] CVI's Petition for Stay of the local order was granted pending the resolution of this appeal.[2] The local rate order establishes a new schedule of basic service and equipment rates and directs CVI to issue refunds to subscribers for all payments made in excess of the rates set forth in the local order for the period September 1, 1993 through July 14, 1994.[3] As part of its decision setting basic tier rates, the City found CVI's collective or package offering of certain individually offered ("a la carte") channels to be a regulated tier of service and, therefore, included those channels as regulated channels for purposes of the local order.

2. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if the Commission determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[8]

3. CVI objects to the City's decision that maximum initial permitted rates for basic services shall be calculated by treating CVI's a la carte package ("Expanded Program Package"), consisting of American Movie Classics, Cable New Network, Turner Network Television, The Discovery Channel and The Nashville Network, as a rate regulated offering. CVI argues that its a la carte package conforms with Commission rules for unregulated treatment of a la carte packages.[9] CVI also objects to the City's manual recomputation of CVI's rates on Form 393. We address each issue in turn.

II. DISCUSSION

A. CVI's A La Carte Offerings

4. CVI objects to the City's finding that the channels comprising its Expanded Program Package must be included as regulated channels. CVI argues that its a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis, and that the package complies with the Commission's a la carte rules in effect at the time the package was created.[10] CVI further argues that the City's reliance upon the 15 interpretive guidelines announced by the Commission in March, 1994 to determine the regulatory status of CVI's a la carte channels constituted "retroactive rulemaking."[11] The City responds that it properly applied the Commission's guidelines on a la carte packages and concluded that the channels in CVI's package should be treated as regulated channels.

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[1] Federal Communications Commission Letter of Inquiry, File No. LOI 93-40 (issued Dec. 13, 1993). The City filed its opposition to CVI's appeal on September 13, 1994.

[2] *Order*, DA 94-1212 (Cab. Serv. Bur., released Nov. 7, 1994.)

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1992).

[4] 47 C.F.R. § 76.944 (1993).

[5] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5837 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket No. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[6] *Id.*

[7] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[8] *Second Reconsideration Order*, 9 FCC Rcd at 4217.

[9] *See Rate Order*, 8 FCC Rcd at 5836-5838; *Second Reconsideration Order*, 9 FCC Rcd at 4213.

[10] *See Rate Order*, 8 FCC Rcd at 5836-5838.

[11] In the *Second Reconsideration Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a

5. The CVI a la carte package at issue was first offered to subscribers on September 1, 1993, when CVI restructured the service offerings on its system that serves the City. CVI states that its September 1, 1993 restructuring involved offering five channels that previously had been offered on its former cable programming service tier on an individual basis and also as a package that CVI alleges is not subject to rate regulation.

6. The issue raised by CVI's appeal already has been resolved in one of our letter of inquiry orders, *Cablevision Industries*, Long Beach, California, LOI-93-40, DA 94-1424 (Cab. Serv. Bur., released Dec. 12, 1994) (*"Cablevision Industries"*) . In *Cablevision Industries*, we found we could not say that it was clear that the Expanded Program Package offered by CVI its system which serves Long Beach, California was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject CVI to refund liability or to require CVI to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that, on a prospective basis, the Expanded Program Package may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration, Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) (*"Going Forward Order"*).[12]

7. We find that the City's determination in its rate order that the channels comprising CVI's a la carte package must be included as regulated channels is inconsistent with the action taken in *Cablevision Industries*. We further find that, in accordance with *Cablevision Industries*, CVI's a la carte package should not be treated as a rate-regulated tier of service. Accordingly, CVI's appeal is granted on this issue and we remand the decision to the City for further proceedings consistent with this ruling.[13]

B. Manual Recomputation of CVI's Rates

8. CVI also contends that the City erred by manually recomputing its rates on Form 393 instead of relying on the Commission's computer spreadsheet version of Form 393 which is how CVI calculated its rates. CVI claims that the computer version of Form 393 resulted in rates that differed by one cent for each tier package of service. In its opposition, the City states that CVI submitted a certified copy of the spreadsheet that reflects the $0.01 increase. The City further states that it will make the appropriate adjustment in CVI's rates and this issue is therefore dismissed as moot.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that CVI's appeal of the local rate order, with respect to the issue of the regulatory status of its a la carte package, IS REMANDED to the City for resolution in accordance with the terms of this Order.

10. IT IS FURTHER ORDERED that CVI's appeal of the local rate order, with respect to the issue of manual recomputation of its rates, IS DISMISSED as moot.

11. IT IS FURTHER ORDERED that our stay of the local rate order which was granted pending resolution of this appeal IS VACATED.

12. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Reconsideration Order*, 9 FCC Rcd at 4214.

[12] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order* at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[13] We need not address CVI's argument with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Reconsideration Order*, in light of the fact that we grant CVI's appeal on this issue.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TRW Inc.	File Nos. 20-DSS-P-91(12)
	CSS-91-015
for Authority to Construct,	17-SAT-LA-95
Launch, and Operate a Low	18-SAT-AMEND-95
Earth Orbit Satellite	
System in the 1610-1626.5	
MHz/2483.5-2500 MHz Band	

ERRATUM

Released: February 28, 1995

Order DA 95-130 (released January 31, 1995) is hereby corrected by substituting the following for paragraph 24:

24. IT IS FURTHER ORDERED that TRW Inc. IS AUTHORIZED to launch and operate twelve low-Earth orbiting space stations and two technically identical spares during the license term for the purpose of providing a mobile satellite service in the United States in the 1610-1621.35/2483.5-2500 MHz frequency bands in accordance with the technical specifications set forth in its applications, and consistent with our rules unless specifically waived herein. In the event the 1610-1612 MHz band is not available for mobile satellite service operations in the United States, TRW Inc. IS AUTHORIZED to operate in the 1612-1622.60/2483.5-2500 MHz bands subject to the interim sharing plan outlined *In the Matter of Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, 9 F.C.C. Rcd. 5936, ¶ ¶ 49-53 (1994), and revisions, if any, adopted in response to pending petitions to reconsider that plan.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Motorola Satellite Communications, Inc.	File Nos. 9-DSS-P-91(87) CSS-91-010 43-DSS-AMEND-92
for Authority to Construct, Launch, and Operate a Low Earth Orbit Satellite System in the 1616-1626.5 MHz Band	15-SAT-LA-95 16-SAT-AMEND-95

ERRATUM

Released: February 28, 1995

Order DA 95-131 (released January 31, 1995) is hereby corrected by substituting the following for paragraph 25:

25. IT IS FURTHER ORDERED that Motorola Satellite Communications, Inc. IS AUTHORIZED to launch and operate 66 low-Earth orbiting space stations and 12 in-orbit spares, and to launch technically identical replacement satellites during the license term for the purpose of providing a mobile satellite service in the United States, in the 1621.35-1626.5 MHz frequency bands in accordance with the technical specifications set forth in its applications and consistent with our rules unless specifically waived herein, subject to the interim sharing plan outlined *In the Matter of Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, 9 F.C.C. Rcd. 5936, ¶ ¶ 49-53 (1994), and revisions, if any, adopted in response to pending petitions to reconsider that plan.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Loral/Qualcomm Partnership, L.P.

File Nos. 19-DSS-P-91(48)
CSS-91-014
21-SAT-MISC-95

For Authority to Construct, Launch, and Operate Globalstar, a Low Earth Orbit Satellite System to Provide Mobile Satellite Services in the 1610-1626.5 MHz/2483.5-2500 MHz Bands

ERRATUM

Released: February 28, 1995

Order DA 95-128 (released January 31, 1995) is hereby corrected by substituting the following for paragraph 25:

25. IT IS FURTHER ORDERED that Loral/Qualcomm Partnership, L.P., IS AUTHORIZED to launch and operate twelve low-Earth orbiting space stations and two technically identical spares during the license term for the purpose of providing a mobile satellite service in the United States in the 1610-1621.35/2483.5-2500 MHz frequency bands in accordance with the technical specifications set forth in its applications, and consistent with our rules unless specifically waived herein. In the event the 1610-1612 MHz band is not available for mobile satellite service operations in the United States, Loral/Qualcomm Partnership, L.P., IS AUTHORIZED to operate in the 1612-1622.60/2483.5-2500 MHz bands subject to the interim sharing plan outlined *In the Matter of Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, 9 F.C.C. Rcd. 5936, ¶ ¶ 49-53 (1994), and revisions, if any, adopted in response to pending petitions to reconsider that plan.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-97, Phase I

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection Through
Virtual Collocation for
Special Access and
Switched Transport

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: February 27, 1995; Released: February 28, 1995

By the Acting Deputy Chief, Common Carrier Bureau:

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I. INTRODUCTION

1. On December 9, 1994, the Common Carrier Bureau (Bureau) released the *Virtual Collocation Tariff Suspension Order*[1] which, *inter alia*, suspended for one day the permanent virtual collocation tariffs filed by the Tier 1 local exchange carriers (LECs)[2] listed in Appendix A,[3] initiated an investigation into the lawfulness of these tariffs, and imposed an accounting order. The Bureau also found it necessary to take immediate action regarding two key rate level issues -- the LECs' proposed overhead loadings and Bell Atlantic's proposed maintenance-related charges -- to prevent apparently excessive rates from taking effect during the Bureau's investigation of the LECs' tariffs. Pursuant to its authority under Section 204(a) of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 204(a), the Bureau partially suspended for a five-month period those rates that appeared unreasonable. The Bureau also rejected certain patently unlawful terms and conditions imposed by several LECs, and ordered certain LECs to make other tariff revisions.

2. In this Order, the Bureau designates two rate level issues for the first phase of this investigation: (1) whether the overhead loadings established in the LECs' interim and permanent virtual collocation tariffs are justified; and (2) whether the maintenance-related charges in Bell Atlantic's interim and permanent virtual collocation tariffs are justified. We also establish a pleading cycle with respect to these two issues. The Bureau will designate additional issues for investigation and establish a separate pleading cycle for discussion of those issues in a subsequent designation order in Phase II of this docket.

II. BACKGROUND

A. In General

3. On July 25, 1994, the Commission released the *Virtual Collocation Order*,[4] which adopted virtual collocation as the basic architecture for providing expanded interconnection service.[5] The *Virtual Collocation Order* directed Tier 1 LECs, other than participants in National Exchange Carrier Association pools, to provide expanded interconnection for special access and switched access transport services through generally available virtual collocation ar-

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[1] Ameritech Operating Companies *et al.*, CC Docket No. 94-97, Order, DA 94-1421 (released Dec. 9, 1994) (*Virtual Collocation Tariff Suspension Order*).

[2] Tier 1 local exchange carriers are companies having annual revenues from regulated telecommunications operations of $100 million or more for a sustained period of time. Commission Requirements for Cost Support Material To Be Filed with 1990 Annual Access Tariffs, Order, 5 FCC Rcd 1364 (1990).

[3] Appendix A provides the full and abbreviated names of these LECs as used in this Order. Appendix B provides the full and abbreviated names of the petitioners as used in this Order.

[4] Expanded Interconnection with Local Telephone Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994), *appeal docketed sub nom.*, Southwestern Bell Telephone Company v. F.C.C., Case No. 94-1547 (D.C. Cir. Aug. 10, 1994) (*Virtual Collocation Order*).

[5] Expanded interconnection service is a LEC offering that enables parties to compete on a facilities basis with certain LEC services by interconnecting their circuits with those of the LEC at the LEC central office. Expanded interconnection through a physical collocation arrangement is an offering that enables an interconnector to locate its own transmission equipment in a segregated portion of a LEC central office. Expanded interconnection through a virtual collocation arrangement enables an interconnector to terminate its circuits in central office transmission equipment that is owned (or leased) and under the exclusive physical control of the LEC. Under the Commission's virtual collocation rules, the interconnector has the right to designate its choice of central office equipment, which is dedicated to the exclusive use of the interconnector. The LEC installs, maintains, and repairs the dedicated equipment. The interconnector pays tariffed charges to the LEC for virtual collocation service. *See Virtual Collocation Order*, 9 FCC Rcd at 5158.

rangements.[6] The Commission exempted LECs from the mandatory virtual collocation requirement in central offices at which they choose to provide physical collocation as a communications common carrier service, subject to non-streamlined regulation.[7] The *Virtual Collocation Order* required non-exempt LECs to file tariffs offering virtual collocation service on September 1, 1994, to be effective on December 15, 1994.[8]

4. The Bureau's *TRP Order*,[9] released concurrently with the *Virtual Collocation Order*, required LECs to file certain cost support data in connection with their rates for virtual collocation. For example, the Bureau directed the LECs to provide information regarding their overhead loadings for virtual collocation services and for comparable services. The Bureau specified that comparable services include all point-to-point DS1 and DS3 services.[10]

5. In conjunction with the *Virtual Collocation Order*, the Commission and the Tier 1 LECs entered into a letter agreement on August 9, 1994, to facilitate an orderly transition from the mandatory physical collocation scheme that had been in place to a mandatory virtual collocation scheme. Pursuant to the letter agreement, the Tier 1 LECs agreed to file interim virtual collocation tariffs on September 1, 1994, that were identical in substance to the permanent virtual collocation tariffs to be filed on that same date. The interim tariffs were designed to ensure the uninterrupted availability of tariffed expanded interconnection service during the period between the effective date of the interim virtual collocation tariffs and December 15, 1994, the date the permanent virtual collocation tariffs were to become effective.[11] On September 2, 1994, following a preliminary review of the LECs' interim virtual collocation tariffs, the Bureau concluded that these tariffs raised significant questions of lawfulness that warranted suspension for one day, investigation, and imposition of an accounting order.[12]

6. On September 1, 1994, the LECs listed in Appendix A filed permanent virtual collocation tariffs and cost support data. In the *Virtual Collocation Tariff Suspension Order*, we focused our review of the permanent virtual collocation tariffs on the LECs' proposed overhead loadings and on Bell Atlantic's maintenance-related charges. Our concerns regarding these two issues are discussed below.

B. The LECs' Overhead Loadings

7. In the *Virtual Collocation Tariff Suspension Order*, the Bureau found that the LECs' level of overhead loadings[13] was a primary factor affecting the rates for virtual collocation. To determine whether the LECs had justified their proposed overhead loadings, we utilized the overhead loading standard set forth in the Commission's *Virtual Collocation Order* -- that if LECs do not use uniform overhead loadings in their rates for virtual collocation services, they must justify any deviations from uniform loadings. In other words, LECs may not recover a greater share of overheads in rates for virtual collocation services than they recover in rates for comparable services, absent justification.[14]

8. Our review of the record revealed that none of the LECs used uniform overhead loadings for all of their comparable DS1 and DS3 services. Moreover, we found substantial differences between the proposed loadings for expanded interconnection services and those currently applied to comparable services. The Bureau determined that the LECs had not attempted to show that these wide variations were due to differences in the overhead costs actually incurred by the individual services. Rather, it appeared that the great disparity in loadings primarily reflected market conditions: most LECs tended to assign low overheads in markets where they faced actual or potential competition from interconnection, and high overheads where they did not. In light of this practice, we concluded that most LECs' proposed overhead loadings appeared unreasonable.[15]

9. To prevent unreasonable discrimination against interconnectors seeking to compete in the local exchange market, the Bureau imposed an interim adjustment pending its further investigation of the LECs' proposed overhead loadings. We suspended, for a five-month period, that part of the LECs' rates that exceeded the lowest overhead loadings assigned to the LECs' comparable DS1 and DS3

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[6] *Virtual Collocation Order*, 9 FCC Rcd at 5156. The *Virtual Collocation Order* responded to the decision of the U.S. Court of Appeals for the D.C. Circuit in Bell Atlantic Telephone Companies v. F.C.C., 24 F.3d 1441 (D.C. Cir. 1994) (*Bell Atlantic v. F.C.C.*). In *Bell Atlantic v. F.C.C.*, the Court vacated in part the first two of the Commission's expanded interconnection Orders in CC Docket No. 91-141, wherein the Commission mandated expanded interconnection through physical collocation arrangements. The Court concluded that the Commission did not have authority under the Act to require LECs to provide expanded interconnection through physical collocation. *Bell Atlantic v. F.C.C.*, 24 F.3d at 1447 (*citing* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992), *recon.*, 8 FCC Rcd 127 (1992), *recon.*, 8 FCC Rcd 7341 (1993)).

[7] *Virtual Collocation Order*, 9 FCC Rcd at 5156.

[8] *Id.* at 5156, 5167-68.

[9] Commission Requirements for Cost Support Material To Be Filed with Virtual Collocation Tariffs for Special Access and Switched Transport, Tariff Review Plan Order, 9 FCC Rcd 5679 (1994) (*TRP Order*).

[10] *TRP Order*, 9 FCC Rcd at 5682-83. A point-to-point service provides a connection between the customer's premises (which, for an interexchange carrier, likely would be its point of presence) and another location (which may be another customer premises or a LEC central office.) A DS1 service is comprised of 24 voiceband channels with a transmission rate of 1.544 megabits per second; a DS3 service is comprised of 28 DS1s. For a discussion of comparable DS1 and DS3 services, *see* paras. 14-15, *infra*.

[11] *See Virtual Collocation Tariff Suspension Order* at para. 6.

[12] *See* Ameritech Operating Companies, *et al.*, CC Docket No. 94-97, Order, 9 FCC Rcd 5230 (Com. Car. Bur. 1994). In our subsequent *Virtual Collocation Tariff Suspension Order*, we consolidated our investigations of the interim and permanent virtual collocation tariffs. The Bureau noted that an upcoming order would designate specific issues for investigation relating to both sets of tariffs. *See Virtual Collocation Tariff Suspension Order* at para. 3.

[13] *Id.* at para. 16. An overhead loading is the percent by which a rate exceeds the direct cost for a particular service. To derive the overhead loading factor from this percentage, the rate is divided by the direct cost for each rate element of that service. An overhead loading of 80 percent, for example, is equivalent to an overhead loading factor of 1.80. *Id.* at note 29.

[14] *Virtual Collocation Order*, 9 FCC Rcd at 5189.

[15] *Virtual Collocation Tariff Suspension Order* at paras. 21-22.

services.[16] We noted that our interim adjustments would extend to interconnectors the same treatment of overhead assignment that the LECs give their most favored DS1 or DS3 customers.[17] Although we did not partially suspend some LECs' rates because their overhead loadings appeared to comport with the Commission's overhead loading standard, we noted that we would examine all of the LECs' overhead loadings during our investigation.[18]

C. Bell Atlantic's Maintenance-Related Charges

10. The *Virtual Collocation Tariff Suspension Order* further concluded that even after the partial disallowance of Bell Atlantic's proposed overhead loadings, the total charge for Bell Atlantic's DS1 virtual collocation service appeared excessive due to its maintenance-related expenses.[19] To determine whether Bell Atlantic had justified its maintenance-related expenses, the Bureau compared the maintenance-related expense Bell Atlantic reported for its DS1 virtual collocation service with the maintenance-related expense Bell Atlantic attributed to its comparable DS1 electrical channel termination service.[20] Our analysis revealed that Bell Atlantic's maintenance-related expenses for DS1 virtual collocation service greatly exceeded those for its comparable service, even though the comparable service requires twice as much investment in the same type of equipment and facilities used for DS1 virtual collocation service.[21] We, therefore, estimated Bell Atlantic's maintenance expense for DS1 virtual collocation to be half of its maintenance expense for DS1 electrical channel termination service. Accordingly, the Bureau reduced Bell Atlantic's recovery of total maintenance expense to this level by partially suspending a portion of the maintenance and maintenance-related administrative expenses recovered through Bell Atlantic's DS1 connection service rate and cable support fee.[22]

III. ISSUES DESIGNATED FOR INVESTIGATION

The Bureau designates for investigation the rate level issues set forth below.

Issue A: Are the overhead loadings established in the LECs' virtual collocation tariffs justified?

1. In General

11. **Pleadings**. As summarized in the *Virtual Collocation Tariff Suspension Order*,[23] petitioners allege that the LECs have assigned higher overhead loadings to their virtual collocation rate elements than to rate elements associated with competitive DS1 and DS3 services offered to the LECs' end-user customers. Petitioners ask the Commission to prescribe reasonable overhead loadings, consistent with those reflected in comparable LEC services.[24] In addition, petitioners contend that most LECs assign a greater proportion of common costs to services used by interconnectors than to services used by the LECs' own end users, forcing the interconnectors to subsidize the LECs' services against which they compete.[25]

12. Generally, the LECs reply that their overhead loadings for virtual collocation services are lower than or comparable to the overhead loadings assigned to their high capacity offerings.[26] Ameritech denies that it is cross-subsidizing its other competitive services with expanded interconnection revenues.[27] Ameritech asserts that its noncompetitive services are priced at fully distributed cost, and its competitive services are priced in response to market demand. Ameritech also maintains that petitioners' comparisons do not take into account rate elements of comparable services that have overhead loadings similar to those used for interconnection.[28] SWB claims, *inter alia*, that it is not required to apply overhead loadings consistent with the lowest priced DS1 or DS3 services, or a particular DS1 or DS3 rate element, such as a channel termination. According to SWB, the amount of overhead in its proposed virtual collocation rates is no higher than the overhead reflected in comparable recurring rates.[29]

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[16] *See id.* at para. 21-23. We noted that an "average overhead loading" standard would not be effective in thwarting anticompetitive behavior. We explained that if LECs used an average overhead loading for services provided to interconnectors and below-average loadings for LEC services with which interconnectors compete, the effect would be to hamper the ability of interconnectors to compete effectively. *Id.* at para. 23.

[17] *Id.* at para. 27.

[18] We also stated that the partial rate suspension may not completely resolve the issue of excessive overheads, and that LECs may be required to provide additional information in a subsequent Designation Order. *Id.* at para. 28.

[19] *Id.* at para. 33. In general, maintenance is a recurring expense associated with keeping equipment in good operating condition. Maintenance expenses usually include engineering, supervision of maintenance staff, equipment testing, and other labor and materials incurred in the upkeep of a carrier's plant. In addition to maintenance expense, Bell Atlantic apparently incurs maintenance-related administrative expenses. Bell Atlantic estimates that, when maintaining interconnector-designated electronic equipment, these related administrative expenses exceed the direct maintenance expenses by eight percent. *See id.* at para. 29.

[20] We note that Bell Atlantic reported the same level of maintenance-related expenses for all of its DS1 channel termination services.

[21] *Virtual Collocation Tariff Suspension Order* at paras. 34-36. Electrical channel termination service requires the LEC to provide the terminating multiplexer at the customer's premises, as well as at the central office. In addition, electrical channel termination service requires several miles of cable from the central office to the customer's premises. *Id.* at para. 34 & n.73.

[22] *Id.* at para. 37.

[23] *Id.* at para. 13.

[24] *See, e.g.*, MFS Petition at 14-15; Cablevision Petition at 2-3, 8-10.

[25] *See, e.g.*, MFS Petition at 13-14.

[26] *See, e.g.*, BellSouth Reply at 11.

[27] Ameritech Reply at 7.

[28] *Id.* at 7-8.

[29] SWB Reply at 20; *see also* SWB's other arguments on this issue, summarized in *Virtual Collocation Tariff Suspension Order* at para. 15.

13. **Discussion**. As discussed above, our *Virtual Collocation Tariff Suspension Order* concluded, based on the record before the Bureau, that most of the LECs failed to justify their proposals to recover a greater share of overhead costs in their proposed charges for virtual collocation than they recover in charges for comparable services. We have reviewed the arguments of the parties and find that investigation of the LECs' proposed overhead loadings is warranted. To assist us in our investigation, we direct all LECs listed in Appendix A to provide the information detailed below.

2. Comparable Services

14. **Background**. In order to evaluate the LECs' proposed overhead loadings for expanded interconnection, the Bureau directed LECs to provide, on a service-by-service basis, overhead loadings for all "comparable services."[30] As discussed above, the Bureau stated that comparable services include all point-to-point DS1 and DS3 special access and switched transport services.[31] The Bureau determined that LECs offer these point-to-point services in two basic forms: (a) as a service providing channel termination without interoffice mileage, *i.e.*, a connection between the customer's premises and the nearest central office; and (b) as a service providing both channel termination and interoffice mileage, connecting the customer to an additional central office.[32]

15. The Bureau also stated that these comparable DS1 and DS3 services include the LECs' generic electrical or optical services, discounted volume and term services, and specialized service offerings, such as self-healing networks. The Bureau required the LECs to identify the overhead loadings applied to each of these services, and to provide the underlying cost data used in calculating the loadings.[33]

16. In addition to seeking overhead loading data, the *TRP Order* required LECs to submit direct cost studies for their point-to-point DS1 and DS3 services,[34] as well as the costing methodologies used to develop the direct costs.[35] Although the LECs generally provided direct cost data for their comparable DS1 and DS3 services, their submissions did not disaggregate investment amounts by service component.[36] Nor did the LECs provide the annual cost factors they applied to each unit investment component of their comparable DS1 and DS3 services to determine the amount of depreciation, cost of money, income taxes, maintenance expense, administrative expense, and other taxes for each comparable service.[37] The foregoing data are important because, to the extent virtual collocation facilities are similar to the comparable service facilities, LECs should use the same unit investment components and annual cost factors for both of these services.

17. Information Requirement. The Bureau requires the LECs subject to this investigation to provide the following information in their direct cases:[38]

(a) All LECs must comment on whether there are additional services that should be considered comparable services.[39] In particular, the LECs must address whether a promotional offering should be considered a comparable service.[40]

(b) All LECs must list all of their unit investment components, and all of the annual cost factors applied to those components, for the following four services: DS1 virtual collocation service; DS3 virtual collocation service; a comparable DS1 service with the lowest overhead loading; and a comparable DS3 service with the lowest overhead loading.[41] Unit investment components should include, but not be limited to, circuit equipment, fiber, conduit, buildings, and land. Annual cost factors should include, but not be limited to, depreciation, cost of money, income taxes, maintenance expense, administrative expense, marketing expense, and other taxes.

(c) All LECs must explain whether the annual cost factors were applied in the same manner to the investment components for the two virtual collocation

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[30] *TRP Order*, 9 FCC Rcd at 5682-83; *Virtual Collocation Tariff Suspension Order* at paras. 17-18.

[31] All of these point-to-point services employ the same basic types of equipment in the LECs' central offices. They all require, for example, a central office entrance cable, an equipment bay containing an optical line terminating multiplexer, and a cross-connect.

[32] *See Virtual Collocation Tariff Suspension Order* at paras. 17-18.

[33] *TRP Order*, 9 FCC Rcd at 5682-83.

[34] We noted that, at a minimum, these direct cost studies should identify unit investment and the costs directly assigned to those unit investments. These directly assignable costs include depreciation, cost of money, income taxes, maintenance expense, administrative expense, marketing expense, and other taxes. These costs are developed for particular services by first identifying the historical ratios between the annual expenses and unit investments, which LECs refer to as annual cost factors. The LECs then multiply the annual cost factors by unit investment to derive directly assignable cost amounts.

[35] In order to compare properly the overhead loadings of the virtual collocation services and the LECs' comparable DS1 and DS3 services, the Bureau sought to ensure that the LECs developed the direct costs for these services in the same manner. Otherwise, a cost classified as a direct cost under one methodology may be classified as an overhead cost under another methodology.

[36] The LECs generally reported a single unit investment amount for each service, rather than identifying the unit investment in circuit equipment, fiber, conduit, buildings, land, and other unit investment components. Bell Atlantic, for example, listed investment amounts for, *inter alia*, the DS1 and DS3 special access channel terminations offered to its most favored customers, but did not identify the investment amounts for the various facilities used in providing its channel termination services.

[37] The LECs, however, did submit the estimated levels resulting from these cost calculations.

[38] As a general matter, all parties to this proceeding are invited to comment on all requests for information in this Order.

[39] There may be other services that employ the same basic types of DS1 and DS3 level equipment in the LECs' central offices, and for which this equipment constitutes a substantial, if not predominant, share of the total cost of the service. *See* note 31, *supra*.

[40] LECs addressing the issues of promotional services should explain the criteria used to classify such services as "promotional." If a LEC concludes that a promotional service should not be considered a comparable service under some or all circumstances, it should specify the type of promotion that should be excluded and the reasons for such exclusion.

[41] The Bureau identified the lowest overhead loadings for comparable DS1 and DS3 services for most LECs in Appendix C to the *Virtual Collocation Tariff Suspension Order*. LECs may respond to the information request in paragraph 17(b) in chart form.

services and the two comparable services. If the same factors were not used, LECs must explain the basis for the differences.

(d) All LECs must list the central office investment and cost components for each of the comparable DS1 and DS3 services identified in (b), above. In addition, LECs must determine and specify the central office investment and cost components for these two comparable services in a manner that parallels the virtual collocation TRP "functions."[42] LECs also must describe in detail the function served by each of the investment components they identify for these comparable services.

(e) If a LEC concludes that any of the comparable services described in the *TRP Order* [43] should not be considered comparable, it should explain how the investment components of those services differ from the investment components of the corresponding DS1 or DS3 virtual collocation services. SWB, for example, must explain why it characterized its comparable DS1 and DS3 services that provide channel termination without interoffice mileage as "rate elements."[44]

(f) All LECs must submit current data detailing the percentage of DS1 and DS3 channel terminations that are sold without interoffice mileage. In calculating this percentage, LECs must include any DS1 and DS3 channel terminations that are sold in conjunction with a zero interoffice mileage charge.

3. Comparison of Overhead Loadings

18. **Background**. Most LECs maintain that the overhead loadings assigned to their virtual collocation services are below or comparable to the loadings assigned to their comparable services. It appears, however, that most of these LECs developed their overhead loadings for virtual collocation services based on an *average* of the overhead loadings for their comparable DS1 and DS3 services. Ameritech, for example, appears to have based the overhead loading for its virtual collocation service on an average of the overhead loadings for its special access category as a whole.[45] SWB claims that, because the overhead loadings reflected in virtual collocation rate elements may not exceed those contained in comparable LEC services, the average overhead loading reflected in all DS1 and DS3 elements effectively becomes the overhead ceiling on collocation elements.[46]

19. Information Requirement. The Bureau requires the LECs to explain in their direct cases how the public interest goal of fostering efficient competition in markets for local telecommunications services is advanced if LECs use average overhead loadings for virtual collocation services provided to competitors and below-average loadings for service provided to their own end users.[47]

4. Rate Elements Common to DS1 and DS3 Virtual Collocation Services

20. **Background**. In the *Virtual Collocation Tariff Suspension Order*, the Bureau ordered adjustments that would extend to interconnectors the same treatment of overhead assignment that the LECs give their most favored DS1 or DS3 customers.[48] Specifically, we directed the LECs to adjust the rate for each element dedicated to DS1 level virtual collocation services to reflect the lowest overhead loadings assigned to the LECs' comparable DS1 services, and to adjust the rate for each element dedicated to DS3 level virtual collocation services to reflect the lowest overhead loadings assigned to the LECs' comparable DS3 services.[49]

21. We also directed the LECs to adjust the rate for each element that may be used with either DS1 or DS3 level virtual collocation services to reflect the lowest overhead loadings assigned to any comparable service, regardless of whether the service is provided at the DS1 or DS3 level. The Bureau considered a rate element nondedicated if it potentially may be used with either DS1 or DS3 level cross-connects. To illustrate, the Bureau stated that a rate element for termination facilities is nondedicated if interconnectors might want to acquire it together with DS1 or DS3 level cross-connects.[50]

22. **Information Requirement**. To examine the LECs' virtual collocation rate elements that may be used with either DS1 or DS3 level cross-connects, the Bureau requires all LECs to list the virtual collocation rate elements they treated as nondedicated in their tariff revisions filed pursuant to the *Virtual Collocation Tariff Suspension Order*.

5. Overhead Loadings On Nonrecurring Charges

23. **Background**. Nonrecurring charges generally recover one-time labor costs or one-time capital outlays. Several LECs, including Bell Atlantic, SWB, and US West, propose to assign overhead loadings to nonrecurring charges associated with virtual collocation services.

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[42] For a description of these TRP functions, *see TRP Order*, 9 FCC Rcd at 5680-81. LECs may submit these data in the TRP format that is appended to the *TRP Order*.

[43] *See id.* at 5682.

[44] *See* SWB Reply at 20.

[45] Ameritech Reply at 6-7.

[46] SWB Reply at 21.

[47] In the *Virtual Collocation Tariff Suspension Order*, the Bureau concluded that LECs appear to assign high overheads to LEC facilities upon which interconnectors rely to provide competitive services, and low overheads to the services against which interconnectors compete. *See Virtual Collocation Tariff Suspension Order* at paras. 21-22.

[48] *Id.* at para. 27.

[49] *Id.* at paras. 25-26. We explained that a rate element is dedicated to DS1 or DS3 expanded interconnection services if interconnectors would only purchase that element to provide services to customers at the DS1 or DS3 level, respectively. Because the transmission level of the cross-connects determines whether the expanded interconnection service can accommodate services to customers at the DS1 or DS3 level, we considered a rate element dedicated to DS1 or DS3 level interconnection if it would only be acquired together with DS1 or DS3 level cross-connects, respectively. *Id.* at para. 26.

[50] *Id.*

24. **Information Requirement**. The Bureau requires Bell Atlantic, SWB, US West, and any other LEC proposing to recover overhead loadings from nonrecurring charges associated with virtual collocation services to provide the following information in their direct cases:

(a) LECs must explain why it is reasonable to assign overhead loadings to nonrecurring charges associated with virtual collocation services.

(b) LECs must identify the term of service that was assumed in developing the overhead loadings assigned to nonrecurring charges associated with virtual collocation services.

(c) LECs must explain why it is reasonable that their virtual collocation tariffs apparently contain no provisions for refunds of overhead contributions in the event interconnectors discontinue service before completion of the term of service on which the assignment of overhead costs was based.

(d) LECs must explain whether overhead loadings are recovered through any nonrecurring charges associated with comparable DS1 and DS3 services. If so, these charges must be identified. If not, LECs must explain why the treatment of overhead loadings on comparable services differs in this respect from that for virtual collocation services.

6. Bell Atlantic's DS3 Cross-Connect Rate Element

25. **Background**. In Section 19.6 of its virtual collocation tariff, Bell Atlantic states that the nonrecurring charge for installation of a DS3 cross-connect is set forth in Section 7.5.9 of Bell Atlantic's special access tariff. That section specifies an $1,800 charge that would apply to installation of all DS3 channel termination services. Interconnectors are assessed additional nonrecurring charges totaling $8,316 in conjunction with installation of virtual collocation service.[51]

26. In the *Virtual Collocation Tariff Suspension Order*, the Bureau used the lowest loading on a comparable DS3 service to adjust Bell Atlantic's DS3 virtual collocation cross-connect installation nonrecurring charge. The Bureau identified Bell Atlantic's DS3 special access electrical channel termination service (five-year term plan) as a comparable DS3 service with the lowest overhead loading.[52] In its cost support submission, Bell Atlantic stated that the overhead loading for this comparable service is 23 percent, but did not specify whether that particular loading is included only in recurring charges or also in the $1,800 nonrecurring installation charge imposed on all DS3 channel termination services.

27. Bell Atlantic, however, subsequently stated in an *ex parte* submission that the Bureau should not have adjusted its $1,800 DS3 cross-connect nonrecurring charge with this 23 percent overhead loading. According to Bell Atlantic, the 23 percent loading does not apply to the $1,800 nonrecurring installation charge imposed on all DS3 channel termination services.[53]

28. **Information Requirement**. The Bureau requires Bell Atlantic to provide the following information in its direct case:

(a) Bell Atlantic must explain why its virtual collocation tariff imposes an $1,800 nonrecurring charge for complete installation of a comparable DS3 special access channel termination service, but requires interconnectors to pay additional nonrecurring charges in conjunction with the installation of virtual collocation services. Bell Atlantic must specify the additional tasks and associated costs that justify the additional nonrecurring charges it imposes in conjunction with virtual collocation services.

(b) Bell Atlantic must submit data showing the overhead loadings and direct cost studies for all of the nonrecurring charges associated with its comparable DS1 and DS3 services.[54] Such data must be provided at the same level of detail that is required for recurring charges.

Issue B: Are Bell Atlantic's maintenance-related charges justified?

1. In General

29. **Pleadings**. As summarized in the *Virtual Collocation Tariff Suspension Order*,[55] Teleport contends that Bell Atlantic's monthly recurring charges for maintenance of interconnector-designated equipment are excessive. Teleport claims that it is unclear whether these charges cover labor, equipment, or both.[56] MFS alleges that Bell Atlantic's DS1 connection service charge, which should cover only the cost of maintaining the interconnector-designated termination equipment, improperly exceeds Bell Atlantic's reported expense for maintaining an entire channel termination.[57] In reply, Bell Atlantic claims that MFS improperly compared Bell Atlantic's rate for connection service to its maintenance expense for a channel termination.[58]

30. **Discussion**. As discussed above, the Bureau concluded in the *Virtual Collocation Tariff Suspension Order* that Bell Atlantic's maintenance-related charges associated with its DS1 virtual collocation service appeared excessive. We have reviewed the arguments of the parties and find that investigation of Bell Atlantic's maintenance-related charges

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[51] Elsewhere in its virtual collocation tariff, Bell Atlantic enumerates charges of $2,227 for design and planning, $5,592 for equipment installation, and $497 for cable installation.

[52] *See* Bell Atlantic Tariff Review Plan, Exhibit 7 at 6.

[53] *See ex parte* letter from Joseph J. Mulieri, Bell Atlantic to Tariff Division, Jan.17, 1995.

[54] In light of these additional data, the Bureau may now determine that it did not initially select the comparable Bell Atlantic DS1 and DS3 services with the lowest overhead loadings.

[55] *Virtual Collocation Tariff Suspension Order* at para. 30.

[56] Teleport Petition, App. A, Item 4 at 1.

[57] MFS Petition at 24-25.

[58] Bell Atlantic Reply at 5-6. Bell Atlantic further asserts that although it proposed a flat maintenance charge in order to provide interconnectors with certainty, it is willing to modify its tariff to offer maintenance of dedicated equipment on a time and materials basis for an "interim period." *Id.* at 2. Bell Atlantic, however, has not made any such tariff modifications.

for both DS1 and DS3 virtual collocation services is warranted. To assist us in our resolution of the issue of whether the level of these proposed charges is justified, we direct Bell Atlantic to provide the information detailed below.

2. Maintenance-Related Administrative Expenses

31. **Background**. Bell Atlantic apparently incurs "maintenance-related" administrative expenses when maintaining interconnector-designated equipment. Bell Atlantic estimated that these related administrative expenses exceeded its "direct" maintenance expenses by eight percent.[59]

32. **Information Requirement**. The Bureau requires Bell Atlantic to provide the following information in its direct case:

(a) Bell Atlantic must identify and describe each cost it intends to recover through its "maintenance-related" administrative charges for both DS1 and DS3 virtual collocation service.

(b) Bell Atlantic must identify and explain the specific functions that are involved in administering the maintenance of interconnector-designated equipment.

(c) Bell Atlantic must explain the relationship of its "maintenance-related" administrative costs to the maintenance activities of its equipment vendors, and the degree to which Bell Atlantic's administration of the maintenance process duplicates such vendor activities.

(d) Bell Atlantic must explain why the expense of administering the equipment maintenance process exceeds the direct expense of maintaining the interconnector-designated equipment.

(e) Bell Atlantic must also explain why more than 95 percent of recurring administrative expenses are attributed to maintenance.

3. Surrogate Equipment

33. **Background**. Because Bell Atlantic purchases transmission equipment from the interconnector for a nominal amount, Bell Atlantic developed an investment amount for "surrogate equipment" to serve as a basis for calculating maintenance expense for DS1 and DS3 virtual collocation services. Bell Atlantic derived this surrogate investment amount by estimating the "average investment expense for transmission equipment."[60] According to Bell Atlantic, it applied to its surrogate investment amount "only the maintenance and administration portion of the operating expense annual cost factors."[61]

34. **Information Requirement**. The Bureau requires Bell Atlantic to provide the following information in its direct case:

(a) Bell Atlantic must explain in detail the calculation of its surrogate investment expense. In particular, Bell Atlantic must discuss whether the "average investment expense" reflects the average of the purchase prices of representative transmission equipment currently used in Bell Atlantic's central offices, the average of the purchase prices of equipment requested by interconnectors, or some other value. Bell Atlantic must also provide the data used to compute its average investment expense.

(b) Bell Atlantic must address whether the operating expense annual cost factors it applied to its surrogate investment for virtual collocation transmission equipment are the same annual cost factors applied to equipment used for Bell Atlantic's comparable DS1 and DS3 services. If the annual cost factors differ, Bell Atlantic must explain the reason for the differences.

4. Comparison of Maintenance-Related Expenses

35. **Background**. As discussed above, the *Virtual Collocation Tariff Suspension Order* concluded that Bell Atlantic's maintenance-related expenses for DS1 virtual collocation service greatly exceed those for its comparable DS1 electrical channel termination service, even though the comparable service required twice as much investment in the same type of equipment and facilities used for DS1 virtual collocation service.[62]

36. **Information Requirement**. The Bureau requires Bell Atlantic to provide the following information in its direct case:

(a) Bell Atlantic must explain why the maintenance-related expenses for its DS1 virtual collocation service exceed the maintenance-related expenses attributed to its comparable DS1 electrical channel termination service.

(b) Bell Atlantic must specify in detail the equipment and facilities used for its DS1 electrical channel termination service and explain any significant differences between this equipment and that used for DS1 virtual collocation services.

(c) Bell Atlantic must provide the investment amount and related expenses for all equipment and facilities listed in response to section (b), above.

(d) Bell Atlantic must provide responses to sections (a) through (c), above, with respect to the maintenance-related expenses attributed to its comparable DS3 electrical and optical channel termination services.[63]

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[59] *Virtual Collocation Tariff Suspension Order* at para. 29.

[60] Bell Atlantic Description and Justification at 7.

[61] *Id.*

[62] *Virtual Collocation Tariff Suspension Order* at para. 34 & n.73.

[63] Our request for data on DS1 channel termination services in paragraph 35(a), *supra*, is limited to services with electrical termination because Bell Atlantic does not provide optical termination for DS1 level services.

IV. PROCEDURAL MATTERS

A. Clarification of Accounting Order Imposed in Virtual Collocation Tariff Suspension Order

1. Background

37. In a December 15, 1994 *ex parte* letter to the Chief, Common Carrier Bureau, Bell Atlantic maintains that the *Virtual Collocation Tariff Suspension Order* does not clarify the "scope of protections" provided by the Bureau's accounting order.[64] In particular, Bell Atlantic contends that the *Virtual Collocation Tariff Suspension Order* does not specify whether the Bureau's partial suspension is subject to a "two-way adjustment mechanism" that would permit either customer refunds or carrier recoupment if the final prescribed rates differ from those in effect during the five-month suspension period. Bell Atlantic notes that the Commission explicitly provided such a mechanism in an earlier order in the physical collocation proceeding,[65] and contends that, "given the extreme nature of the interim reductions specified in the *Virtual Collocation Tariff Suspension Order*, at least some of which is excessive, it is assumed that the same mechanism is in effect in this proceeding." Alternatively, Bell Atlantic requests that the Bureau clarify that the two-way mechanism is in effect in the virtual collocation tariff proceeding.[66]

2. Discussion

38. The *Virtual Collocation Tariff Suspension Order* did not establish a two-way adjustment mechanism in conjunction with the partial suspension of the LECs' permanent virtual collocation tariffs. Neither the text nor the ordering clauses of the *Virtual Collocation Tariff Suspension Order* indicate that the accounting order we imposed therein is to function as a two-way adjustment mechanism. That Order stated only that the Bureau partially suspended the LECs' virtual collocation rates for five months under the authority of Section 204(a), and imposed an accounting order pursuant to Sections 204(a) and 4(i) of the Act, 47 U.S.C. §§ 204(a) and 154(i). By contrast, the *Special Access Physical Collocation Interim Overhead Order* explicitly stated that the Commission's interim prescription was subject to adjustment in either direction at the conclusion of the physical collocation tariff investigation.[67]

39. The circumstances that prompted the Commission to establish a two-way adjustment mechanism in the physical collocation tariff proceeding are not present here. In the *Special Access Physical Collocation Interim Overhead Order*, the Commission exercised its Section 4(i) discretionary authority to impose an interim prescription *beyond* the Section 204(a) five-month suspension period.[68] The Commission was concerned that, absent an interim prescription, the expected benefits of expanded interconnection would be delayed during the remainder of the tariff investigation.[69] Given the need for further investigation of the LECs' overhead loadings beyond the suspension period, the Commission stated that its interim prescription would be subject to adjustment in either direction at the conclusion of the Commission's investigation.[70]

40. By contrast, in this tariff proceeding, the Bureau exercised its Section 204(a) suspension power to establish interim rates that will be in effect for a maximum of only five months -- a far shorter period than present in the physical collocation proceeding described above. In authorizing the suspension of carriers' tariffs in whole or in part pending completion of the investigation of the rates, the Act contemplates that a carrier will not receive all the revenues that it otherwise would have collected during the five-month suspension period specified by Section 204(a).[71] In view of this statutory scheme, we would not expect to use our discretionary authority under Section 4(i) of the Act to permit carriers to recoup revenues at the end of a five-month suspension period, absent unusual circumstances. Accordingly, we declined to exercise our discretion under Section 4(i) to establish a two-way accounting order in this proceeding.

B. Filing Schedules and Procedures

41. This investigation will be conducted as a notice and comment proceeding to which the procedures set forth in this Order shall apply. The LECs listed in Appendix A to this Order are designated as parties. These LECs must file their direct cases addressing each issue designated above no later than March 21, 1995.

42. Pleadings responding to direct cases may be filed no later than April 4, 1995, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." The LECs may each file a "Rebuttal" to oppositions or comments no later than April 11, 1995.

43. An original and seven copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, International Transcription Service, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy must be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their

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[64] *Ex parte* Letter from Joseph J. Mulieri, Bell Atlantic, to Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Dec. 15, 1994 (Bell Atlantic Letter).

[65] Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, First Report and Order, 8 FCC Rcd 8344 (1993) *(Special Access Physical Collocation Interim Overhead Order)*.

[66] Bell Atlantic Letter at 2.

[67] *Special Access Physical Collocation Interim Overhead Order*, 8 FCC Rcd at 8362.

[68] *Id.*

[69] *Id.*

[70] Specifically, the Commission stated that its two-way adjustment mechanism would provide an opportunity for interconnectors to receive refunds if the Commission later determines that the interim rates are unreasonably high. Conversely, the arrangement would provide an opportunity for carrier recoupment if the Commission later determines that the interim rates are below a just and reasonable level. *Id.*

[71] *Cf.* F.P.C. v. Tennessee Gas Transmission Co., 371 U.S. 145, 152 (1962).

comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments should specify the docket number of this investigation.

44. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the order.

C. *Ex Parte* Requirements

45. *Ex parte* contacts (*i.e.*, written or oral communications that address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until the commencement of the Sunshine Agenda period. The Sunshine Agenda period terminates when a final order is released and the final Order is issued. Written *ex parte* contacts and memoranda summarizing oral *ex parte* contacts must be filed on the day of the presentation with the Secretary and Commission employees receiving each presentation. For other requirements, see generally Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. §§ 1.1200 *et seq.*

D. Paperwork Reduction Act

46. The collection of information in this Phase I Designation Order is not subject to the provisions of Section 3507 of the Paperwork Reduction Act of 1980, as amended.

V. ORDERING CLAUSES

47. IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205, and 403, the issues set forth in this Order ARE DESIGNATED FOR INVESTIGATION.

48. IT IS FURTHER ORDERED that the local exchange carriers listed in Appendix A of this Order SHALL BE parties to this proceeding.

49. IT IS FURTHER ORDERED that each local exchange carrier that is a party to this proceeding SHALL INCLUDE, in its direct case, a response to each request for information that it is required to answer in this Order.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Deputy Chief, Operations
Common Carrier Bureau

APPENDIX A

LECs Filing Permanent Virtual Collocation Tariffs

Ameritech Operating Companies (Ameritech)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Telecommunications, Inc. (BellSouth)
Cincinnati Bell Telephone Companies (CBT)
GTE System Telephone Companies (GSTC)*
GTE Telephone Operating Companies (GTOC)*
Southwestern Bell Telephone Company (SWB)
United and Central Telephone Companies (United)
US West Communications, Inc. (US West)

* GTOC and GSTC are referred to collectively as GTE.

APPENDIX B

Parties Filing Petitions to Reject or Suspend and Investigate and the LECs Against Which They Filed[72]

Association for Local Telecommunications Services (ALTS)
(Ameritech, Bell Atlantic, BellSouth, SWB, US West)

Cablevision Lightpath, Inc. (Cablevision)
(Ameritech, Bell Atlantic)

Jones Lightwave, Ltd. (Jones)
(US West)

MCI Communications Corporation (MCI)
(Ameritech, Bell Atlantic, BellSouth, CBT, GTE, SWB, United, US West)

McLeod Telemanagement, Inc. (McLeod)
(US West)

MFS Communications Company, Inc. (MFS)
(Ameritech, Bell Atlantic, BellSouth, CBT, GTE, SWB, United, US West)

Teleport Communications Group, Inc. (Teleport)
(Ameritech, Bell Atlantic, BellSouth, GTE, SWB, US West)

Time Warner Communications Holdings, Inc.
(Ameritech, Bell Atlantic, BellSouth, CBT, GTE, SWB, United, US West)

[72] Each LEC listed in Appendix A filed an opposition to the petition(s) to reject or suspend and investigate filed against it.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIME WARNER	Litchfield, CT
ENTERTAINMENT	Morris, CT
COMPANY, L.P., d/b/a	Thomaston, CT
LAUREL CABLEVISION	Torrington, CT
	Warren, CT
Appeal of Local Rate Order	Watertown, CT
of State of Connecticut	
Department of Public	
Utility Control	

ORDER

Adopted: February 28, 1995; Released: March 1, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 23, 1994, Time Warner Entertainment Company, L.P., d/b/a Laurel Cablevision ("Laurel"), filed with the Commission a Petition for Review of Rate Order ("Petition") adopted by the State of Connecticut Department of Public Utility Control ("the State") on August 24, 1994. On September 23, 1994, Laurel also filed an Emergency Petition for a Stay of Enforcement Pending Review of the local rate order. The State did not file an opposition to the stay petition. On October 6, 1994, the Commission granted Laurel's stay petition which stayed the effectiveness of the local rate order pending the resolution of Laurel's appeal.[1] In its local order, the State established Laurel's rates for basic cable service, equipment, installations and hourly service charges in the Towns of Litchfield, Morris, Thomaston, Torrington, Warren, and Watertown, Connecticut.[2] As part of this decision setting the basic tier rates, the State found Laurel's collective or package offering of certain individually offered ("a la carte") channels to be a regulated tier of service and, therefore, included those channels as regulated channels for purposes of the local order. The State ordered Laurel to make refunds or to credit subscribers for all payments made in excess of the rates set forth in the local order for the period September 1, 1993 to July 14, 1994.[3]

2. In its appeal, Laurel challenges the local order on the grounds that the State did not have the authority to make determinations regarding the status of the a la carte package and that, even if the State did have such authority, the State's decision to treat the channels in the a la carte package as regulated channels is contrary to the Commission's a la carte rules and the objectives of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). The State responds that, pursuant to authority granted by the Commission, it properly applied the Commission's guidelines on a la carte packages and concluded that the channels in Laurel's package should be treated as regulated channels.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve thecase consistent with the Commission's decision on appeal.[7] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[8]

II. DISCUSSION

4. Laurel objects to the State's finding in the local order that the channels comprising the Customer Choice a la carte package at issue in this appeal (WTBS and WWOR) must be included as regulated channels.[9] Laurel contends that the State lacks the authority to make determinations regarding the status of the a la carte package.[10] Laurel

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[1] *See* Time Warner Entertainment Co., 9 FCC Rcd 5815 (1994). Other filings in this proceeding include an Opposition to Petition for Review filed by the State on October 6, 1994 and a Reply to Opposition filed by Laurel on October 18, 1994.

[2] *See* Petition, Exhibit A, DPUC Review of Basic Cable Rates and Equipment of Laurel Cablevision, Inc., Docket No. 93-12-13, (August 24, 1994).

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[4] 47 C.F.R. § 76.944.

[5] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket No. 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[6] *Id.*

[7] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[8] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration and Fourth Report and Order, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (1994) (*"Second Reconsideration Order"*).

[9] *See* Petition, Exhibit A at 12.

[10] Petition at 4-5.

further argues that its a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis.[11] Laurel maintains that its a la carte package fully complies with Commission rules for unregulated treatment existing at the time the package was created.[12] In addition, Laurel contends that the State erred in retroactively applying the 15 guidelines set forth in the *Second Reconsideration Order* and that, even under the 15 guidelines, the State erred in treating Laurel's a la carte services as regulated channels.[13]

5. The a la carte package at issue was first offered to subscribers on September 1, 1993, when Laurel restructured the service offerings on its system serving the Towns of Litchfield, Morris, Thomaston, Torrington, Warren, and Watertown, Connecticut. Laurel states that its September 1, 1993 restructuring involved offering two channels from its former cable programming service tier on an individual basis and also as a package that Laurel alleges is not subject to rate regulation.

6. The facts presented in this appeal closely resemble the facts presented in one of our recently issued letter of inquiry orders on a la carte packages, *Paragon Cable*, Irving, Texas, LOI-93-25, DA 94-1315 (Cab. Serv. Bur., released Nov. 25, 1994), in which we resolved the regulatory status of an la carte package offered by Paragon Cable that is essentially the same as the a la carte package at issue in this appeal. Specifically, the a la carte package at issue in the *Paragon Cable* order was a two-channel package that was offered as part of a restructuring and was created by moving two channels from the basic service tier. In the *Paragon Cable* case, we found we could not say that it was clear that the a la carte package at issue was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that the a la carte package at issue may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) ("*Going Forward Order*").[14]

7. We find that the State's determination that Laurel's a la carte package is a regulated tier is inconsistent with the action taken in the letter of inquiry orders, and in particular, in *Paragon Cable*.[15] We further find that, in accordance with *Paragon Cable*, Laurel's a la carte package should not be treated as a rate regulated tier of service. Accordingly, we are remanding this issue to the State so that it can enter an order consistent with our findings in *Paragon Cable*.[16]

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the appeal of the local order, with respect to the issue of the regulatory status of Laurel's a la carte package, is REMANDED to the State for resolution in accordance with the terms of this Order.

9. IT IS FURTHER ORDERED that our stay of the local order which was granted pending the resolution of this appeal is hereby VACATED.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[11] Petition at 8; Petition, Exhibit B at 8-9.

[12] Petition at 9-10; *See Rate Order*, 8 FCC Rcd at 5836-5838; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration and Second Report and Order, MM Docket 92-266, 9 FCC Rcd 1164, 1184 (1993).

[13] Petition at 5-9 and 10-15; *See Second Reconsideration Order*, 9 FCC Rcd at 4214-4216.

[14] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order* at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[15] Laurel's argument that the State has no authority to determine the regulatory status of a la carte service offerings is without merit. The State's rate order was adopted on August 24, 1994. In the *Second Reconsideration Order*, effective May 15, 1994, the Commission provided that "local authorities may make any necessary 'a la carte' determination as part of their final decision setting rates for the basic tier. *Id.* at 4217. Contrary to Laurel's contention, this provision does not delegate the Commission's jurisdiction over cable programming service tier rates to local authorities. Rather, it allows local authorities to make an initial determination concerning the number of regulated channels that is necessary to accomplish their review of basic service tier rates.

[16] We need not address Laurel's arguments with respect to the "retroactive" application by the State of the 15 guidelines set forth in the *Second Reconsideration Order* in light of the fact that we grant Laurel's appeal on the a la carte issue and remand this case to the State.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIME WARNER CABLE
d/b/a Cablevision of
Orange

Appeal of Local
Rate Order of City of
Orange, California

ORDER

Adopted: February 28, 1995; Released: March 1, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On September 22, 1994, Time Warner Cable, d/b/a Cablevision of Orange ("Cablevision") filed with the Commission a Petition for Review of Rate Order ("Petition") of the local rate order ("local order") adopted by the City of Orange, California ("the City").[1] In its local order, the City established Cablevision's rates for basic cable service and associated equipment.[2] As part of this decision setting the basic tier rates, the City found Cablevision's collective or package offering of certain individually offered ("a la carte") channels to be a regulated tier of service, and, therefore, included those channels as regulated channels for purposes of the local order. The City ordered Cablevision to make refunds to subscribers for all payments made in excess of the rates set forth in the local order for the period of September 1, 1993 through July 15, 1994 plus interest.[3]

2. In its appeal, Cablevision challenges the local order on several grounds.[4] Cablevision argues that the City exceeded its authority in determining that its a la carte services should be treated as regulated channels. Cablevision also argues that the City's consultant applied the wrong legal standard when it relied on the 15 interpretive guidelines announced by the Commission in March 1994 to determine the regulatory status of Cablevision's a la carte channels and improperly gave "retroactive effect" to these guidelines.[5] Finally, Cablevision argues that its a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourages cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis and that the package complies with the Commission's a la carte rules in effect at the time the package was created.[6]

3. In its opposition, the City submits the findings of the Consultant in support of the local order.[7] The City makes no legal argument in opposition to Cablevision's a la carte claims, but states that the Commission is best suited to respond to Cablevision's claim that the City lacks jurisdiction to determine whether Cablevision's a la carte programming should be treated as regulated channels and whether the City may order refunds of unreasonable basic service tier rates.

4. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[8] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo review*, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[9] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[10] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[11] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has

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[1] The City filed an opposition and Cablevision did not submit a reply to the City's opposition. The local order automatically grants a stay of the refund obligation pending Commission review.

[2] *See* Petition, Exhibit A, Resolution of the City Council of the City of Orange Ordering Refunds and Setting Rates For Basic Cable Television Service In Accordance with Federal Communications Commission Form 393. Resolution No. 8379, City of Orange County, California, (August 23, 1994). The City retained the services of Communications Support Group, Inc., ("Consultant") to review the Form 393 filed by Cablevision. The City unanimously adopted the Consultant's findings and recommendations in the local order.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[4] Cablevision argues that the City has no authority to order refunds of basic rates. The Commission has established rules which authorize local franchising authorities to order refunds for unreasonable basic service tier rates and has addressed this issue in a prior decision. Therefore, Cablevision's argument is rejected. *See* 47 C.F.R. § 76.942(a)(1993)("a franchising authority may order a cable operator to refund to subscribers that portion of previously paid rates determined to be in excess of the permitted tier charge or above the actual cost of equipment"); Harron Communications Corp., DA 95-160 (Cab. Serv. Bur., released February 7, 1995).

[5] Petition at 5. In the Second Reconsideration Order, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Reconsideration Order*, 9 FCC Rcd at 4214.

[6] *See* Rate Order, 8 FCC Rcd at 5836-5838.

[7] *See* Exhibit D.

[8] 47 C.F.R. § 76.944.

[9] *Rate Order*, 8 FCC Rcd at 5731; *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation, Buy - Through Prohibition, Third Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[10] *Id.*

[11] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 Fcc Rcd at 4346.

stated that "the Commission will defer to the local authority's finding of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[12]

II. DISCUSSION

5. Cablevision objects to the City's finding in the local rate order that its a la carte services (WGN and WTBS) must be included in the regulated channel count for the purpose of calculating benchmark rates.[13] Cablevision argues that its a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis.[14] Cablevision further argues that its a la carte package fully complies with Commission rules for unregulated treatment existing at the time the package was created.[15]

6. The Cablevision a la carte services at issue were first offered to subscribers on September 1, 1993, when Cablevision restructured the service offerings on its Orange, California system. Cablevision states that its September 1, 1993 restructuring involved moving two channels from its cable programming tier and offering the two channels on an individual basis and also as a package that Cablevision alleges is not subject to rate regulation.

7. The facts presented in this appeal closely resemble the facts presented in one of our letter of inquiry orders, *Paragon Cable*, Irving, Texas, LOI-93-25, DA 94-1315 (Cab. Serv. Bur. released Nov. 25, 1994), (*"Paragon of Irving"*), in which we resolved the regulatory status of an a la carte package offered by Paragon Cable on its Irving, Texas, system that is essentially the same as the a la carte package at issue in this appeal. Specifically, the a la carte package at issue in the *Paragon of Irving* order was a two channel package, made up of channels formerly available on the basic service tier, which was offered as part of restructuring. In that case, we found that we could not say that it was clear that the a la carte package at issue was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that the a la carte package at issue may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994) ("Going Forward Order").[16]

8. We find that the City's determination that Cablevision's a la carte packages are regulated tiers is inconsistent with the action taken in the letter of inquiry orders, and in particular, *Paragon of Irving*. We further find that, in accordance with *Paragon of Irving*, Cablevision's a la carte packages should not be treated as rate regulated tiers of service. Accordingly, we are remanding this issue to the City so that it can enter an order consistent with our findings in *Paragon of Irving*.[17]

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the appeal of the local order, with respect to the issue of the regulatory status of Cablevision's a la carte package, is REMANDED to the City for resolution in accordance with the terms of this Order.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration and Fourth Report and Order, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (1994) (*"Second Reconsideration Order"*).

[13] Petition at 3.

[14] *Id.* at 6 and 7.

[15] *Id.* at 5. *See Rate Order*, 8 FCC Rcd at 5836-5838; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: First Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 1164, 1184 (1993); *Second Reconsideration Order*, 9 FCC Rcd at 4213.

[16] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order* at ¶ ¶ 16-37. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. Id. at ¶ 51. However, the Commission also stated that with respect to packages created between April 1, 1993, and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[17] Cablevision's argument that the City has no authority to determine the regulatory status of a la carte service offerings is without merit. The City's rate order was adopted on August 23, 1994. In the *Second Reconsideration Order*, effective May 15, 1994, the Commission provided that "local authorities may make any necessary 'a la carte' determinations as part of their final decision setting rates for the basic tier. *Second Reconsideration Order*, 9 FCC Rcd at 4217. Contrary to Cablevision's contention, this provision does not delegate the Commission's jurisdiction to prevent evasions of the 1992 Cable Act. Rather, it allows local authorities to make a determination concerning the number of regulated channels that is necessary to accomplish their review of basic service tier rates.

We need not address Cablevision's arguments with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Reconsideration Order*, and the authority of the City to order refunds of basic service rates, in light of the fact that we grant Cablevision's appeal on the a la carte issue and remand this case to the City so that it may enter an order consistent with our findings in our letter of inquiry orders.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MetroVision, Inc. CUID Nos. MD0163, MD0184
MI0795

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices MetroVision, Inc. ("MetroVision"), through its subsidiary companies as shown on Appendix A, was charging for its Cable Program Service ("CPS") Tier in the communities designated by the CUID numbers referenced above and on Appendix A. MetroVision has attempted to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of MetroVision's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in each of the franchise areas was completed and served on MetroVision and filed with the Commission as set forth in Appendix A.

5. MetroVision attempted to justify its CPS prices through Forms 393 filed and amended[11] on the dates set forth on Appendix B.

III. DISCUSSION

6. MetroVision asserts that its monthly CPS tier prices per subscriber are justified by its benchmark filings because its prices are equal to or below the maximum permitted charges as calculated in its filings. Upon review of MetroVision's Forms 393, we have found no apparent errors that would require a recalculation of MetroVision's maximum permitted CPS prices.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that MetroVision has demonstrated that its CPS tier prices (plus franchise fee) as shown on Appendix C were equal to or below the maximum permitted prices for the CPS tier for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent MetroVision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which MetroVision implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* 9 FCC Rcd at 4189 n.195.

[11] MetroVision amended its FCC Forms 393 in response to an Order citing common deficiencies observed in benchmark filings generally. *See Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] This finding is based solely on the representations of MetroVision listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced on Appendix A against the cable programming service prices charged by MetroVision, Inc. and its subsidiary companies, and all other complaints in these franchise areas relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filings submitted by MetroVision, Inc. and its subsidiary companies (as shown on Appendix B) with respect to the franchise areas referenced on Appendix A for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994, justify the prices shown on Appendix C (plus franchise fee) for MetroVision's Cable Programming Service Tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A
First Valid 329s Filed with the FCC

MetroVision of Prince George's County, Maryland - system 004448

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
MD0163	09-28-93	09-27-93
MD0184	11-01-93	10-28-93

MetroVision of Michigan - system 10680

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
MI0795	12-13-93	09-02-93

Appendix B
Initial and Amended Form 393 Filings

MetroVision of Prince George's County, Maryland - system 004448

CUID	Initial Form 393 Filing	Amended Form 393 Filing(s)
MD0163	01-18-94	6-23-94
D0184	12-12-93	6-23-94

MetroVision of Michigan - system 10680

CUID	Initial Form	Amended Form 393 Filing(s)
MI0795	01-25-94	6-23-94

Appendix C
Maximum Permitted Rates

MetroVision of Prince George's County, Maryland - system 004448

CUID No.	Cable Service
MD0163	$10.99
MD0184	$10.99

MetroVision of Michigan - system 10680

CUID No.	Cable Service
MI0795	$11.80

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

U.S. Cablevision Corporation	CUID Nos. NY0047, NY0048, NY0271, NY0272, NY0273, NY0276, NY0274, NY0305, NY0306, NY0307, NY1209, NY0308, NY0309, NY0375, NY0726, NY1116, NY1208

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price U.S. Cablevision Corporation ("U.S. Cablevision") was charging for its cable programming service ("CPS") tier in the communities designated by the CUID numbers referenced above and on Appendix A. U.S. Cablevision has attempted to justify its price through identical benchmark showings on FCC Forms 393. This Order addresses the reasonableness of U.S. Cablevision's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in each of the franchise areas was completed and served on U.S. Cablevision and filed with the Commission as set forth on Appendix A.

5. U.S. Cablevision attempted to justify its CPS price through FCC Forms 393 filed on January 24, 25 and 26, 1994. U.S. Cablevision amended its justification on June 23, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[11] and on January 25, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[12]

III. DISCUSSION

6. In its amended benchmark filings of January 25, 1995, U.S. Cablevision calculated a maximum permitted price for the CPS tier of $9.66 per month. Upon review of U.S. Cablevision's filing, we have found no apparent errors that would require a recalculation of U.S. Cablevision's maximum permitted CPS price of $9.66.[13] However, U.S.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent U.S. Cablevision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which U.S. Cablevision implemented its CPS price under the new regulations. *See* para. 3, *infra*.Further, to the extent that the price for the period ending May 14, 1994 is found to be excessive, a reduction in U.S. Cablevision's price for the period after May 14, 1994 may be required to reflect the fact that U.S. Cablevision's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. 47 C.F.R. §76.922(b)(4)(c).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan.20, 1995).

[13] U.S. Cablevision recalculated its inflation adjustment and number of satellite channels in its January 25, 1995 amendments in accordance with the principles set out in the Public Notice.

Cablevision's actual price for the CPS tier was $9.69 per month. Thus, U.S. Cablevision has failed to demonstrate that its price for the CPS tier was not unreasonable.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that U.S. Cablevision's showing supports a maximum reasonable CPS tier price of $9.66 per month (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994.[14] However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

8. We further conclude that U.S. Cablevision must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that U.S. Cablevision's price during the earlier period was unreasonable.[15] We reserve the right to make further adjustments to U.S. Cablevision's prices for the period after May 14, 1994 upon completion of our review of U.S. Cablevision's FCC Form 1200 rate filing.

9. We further conclude that U.S. Cablevision has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[16] As provided in the Public Notice, we will relieve U.S. Cablevision of its obligation to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced on Appendix A against the cable programming service price charged by U.S. Cablevision Corporation, and all other complaints in these franchise areas relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by U.S. Cablevision Corporation for the period from the filing of the earliest complaint in each franchise area (as shown on Appendix A) to May 14, 1994, justifies a maximum price of $9.66 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that U.S. Cablevision Corporation shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise areas set forth on Appendix A for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted rate (plus franchise fee).

13. IT IS FURTHER ORDERED that U.S. Cablevision Corporation shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that U.S. Cablevision Corporation shall not be required to obtain advance Commission approval of adjustments to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

APPENDIX A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served on U.S. Cablevision
NY0047 Blooming Grove	12/29/93	12/23/93
NY0048 Monroe	12/28/93	12/22/93
NY0271 Beacon	12/21/93	12/17/93
NY0272 Fishkill Village	12/22/93	12/20/93
NY0273 Fishkill Town	12/30/93	12/27/93
NY0274 Hyde Park	12/27/93	12/20/93
NY0276 Lloyd	12/30/93	12/27/93
NY0305 Monroe Village	12/28/93	12/23/93
NY0306 Marlborough	1/3/94	12/29/93
NY0307 Plattekill	12/29/93	12/23/93
NY0308 Wappinger	12/27/93	12/20/93
NY0309 Poughkeepsie	12/21/93	12/17/93
NY0375 Lagrange	12/21/93	12/17/93
NY0726 Harriman	1/3/94	12/29/93
NY1116 Cold Springs	12/30/93	12/27/93
NY1208 Philipstown	1/5/94	12/28/93
NY1209 Nelsonville	1/5/94	12/28/93

[14] This finding is based solely on the representations of U.S. Cablevision listed in paragraph 5, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] We reviewed U.S. Cablevision's FCC Form 1200 rate filing and confirmed that U.S. Cablevision calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

[16] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision Industries New York	CUID Nos. NY0322, NY0437, NY0492, NY0514, NY0717, NY0821, NY0878, NY1384

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Cablevision Industries ("CVI") was charging for its cable programming service ("CPS") tier in Orange County, New York, CUID Nos. NY0492, NY0514, NY0717, and NY0821; Warren County, New York, CUID No. NY0322; Ulster County, New York, CUID No. NY0437; Genesee County, New York, CUID No. NY0878; and Chautauqua County, New York, CUID No. NY1384. CVI has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of CVI's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review a cable operator's prices for its cable programming service ("CPS") tier upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas addressed in this Order were completed and served on CVI and received by the Commission on the dates set forth in Appendix A.[11]

5. CVI filed its first FCC Form 393 filing on the dates set forth in Appendix B. CVI subsequently amended its Form 393 filings in response to two Commission letters which requested clarification on CVI's initial filings.[12]

III. DISCUSSION

6. CVI erroneously asserts that its monthly CPS tier prices per subscriber are justified, in each of the communities addressed by this Order with the exception of CUID No. NY0437, by its benchmark filings because its prices are "within the maximum permitted rates" as calculated in its

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent CVI has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which CVI implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in CVI's prices for the period after May 14, 1994 may be required to reflect the fact that CVI's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration;* 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189, n.195.

[11] The earliest filed complaints were dated as set forth in Appendix A and state that they were mailed to CVI on those dates. CVI has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider the date of the complaint as the service date.

[12] Letters from William P. Agee, FCC, to Eric E. Breisach, attorney-of-record for CVI (December 21, 1994 and December 29, 1994).

Form 393 filings.[13] Upon review of CVI's FCC Form 393's, we have found the following errors that require a recalculation of CVI's maximum permitted CPS prices:

a. On September 1, 1993, CVI restructured its rates. As part of this restructuring, CVI reduced its CPS price and basic programming tier price in each franchise area. These changes, however, are not reflected on Line 101 of Worksheet 1 of Part II of CVI's FCC Form 393. Instead of entering its currently effective tier prices, as required by the directions for Line 101, CVI entered its previously effective tier prices. Accordingly, on Line 101 we enter for each franchise area the currently effective CPS and basic programming tier prices.

b. Since CVI restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered on Part II, Worksheet 1, Line 104 should have been close or identical to its equipment cost figure on Part III, Step G, Line 34.[14] Accordingly, on Line 104 we enter for each franchise area the identical figure that is on Line 34 of Step G of Part III.

c. For CUID No. NY1384, CVI's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part I and Form 393, Part II, Worksheet 1) record 14 rate-regulated channels on its CPS tier and 17 rate-regulated channels on the basic programming tier; however, our review of the channel line-up provided by CVI for the initial date of regulation indicates 13 channels on the CPS tier and 18 channels on the basic programming tier. Therefore, we decrease the number of rate-regulated channels on the CPS tier from 14 to 13 and we increase the number of rate-regulated channels on the basic programming tier from 17 to 18.

d. For CUID No. NY0322, CVI's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) record 18 rate-regulated channels on its CPS tier; however, our review of the channel line-up for September 30, 1992 indicates 17 channels on the CPS tier. Therefore, we decrease the number of rate-regulated channels on the CPS tier from 18 to 17. We also decrease the number of rate-regulated channels used in calculating CVI's benchmark (Form 393, Part II, Worksheet 2, Line 220) from 35 to 34, and we decrease the number of satellite channels used from 27 to 26.

e. For CUID Nos. NY0492, NY0514, NY0717, and NY0821, CVI's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) count channel 15 as a rate-regulated satellite channel on the basic tier and channel 30 as a rate-regulated satellite channel on the CPS tier. Both channel 15 and 30, however, carry identical programming at the same time. Because subscribers receive only one programming service over channels 15 and 30, CVI cannot charge subscribers for these channels as separate units of cable service.[15] We therefore further reduce by one the number of rate-regulated channels on the CPS tier as of September 30, 1992 on Form 393, Part II, Worksheet 2, Line 202, and the number of rate-regulated channels and satellite channels used in calculating the benchmark on Form 393, Part II, Worksheet 2, Line 220.

7. Because of these errors, we conclude that CVI has failed to demonstrate that its prices for the CPS tier were not unreasonable. We will therefore set prices for this tier, incorporating the adjustments discussed above. In doing so we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its Forms 393, CVI apparently calculated the Inflation Adjustment Factor using the data it relied on when it set its CPS prices. If, based on this data, Form 393 indicated that CVI's prices were reasonable, then CVI would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[16] However, CVI has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that CVI should have filed FCC Form 393 for each franchise area.[17] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992, 126.5 for the fourth quarter of 1993, and 127.5 for the first quarter of 1994. Using these GNP-PI figures, we calculate Inflation Adjustment Factors of 1.039 through February 1994 for CUID Nos. NY0322, NY0437, NY0492, NY0514, NY0821, NY0878, and NY1384 and 1.032 through November 1993 for CUID No. NY0717.

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[13] For CUID Nos. NY0322, NY0878, and NY 1384, the maximum permitted CPS prices, as calculated by CVI, exceeded CVI's actual CPS prices (franchise fees excluded) by $0.03 to $0.06. However, for CUID Nos. NY0492, NY0514, NY0717, and NY0821, the actual CPS prices charged by CVI exceeded the maximum permitted CPS prices, as calculated by CVI in its Form 393 filings, by $0.48 to $0.69.

[14] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993)("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations. . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.")

[15] *See Cox Cable, Virginia Beach, Virginia*, CUID No. VA0166, DA 94-1288, para. 6e (Cab. Serv. Bur., released November 18, 1994).

[16] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[17] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). Our rules require a cable operator to respond to a complaint that is not returned by the Commission within 30 days after the complaint is served. 47 C.F.R. § 76.956(c). In some of the systems that we address in this Order, CVI did not comply with this rule. CVI cannot be permitted an additional inflation adjustment simply because it filed Form 393 late. *See Times Mirror Cable Television of Orange County, San Clemente, California*, DA 94-1334 (Cab. Serv. Bur., released November 29, 1994).

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that CVI's showing supports the maximum reasonable CPS tier price for each franchise area set forth in Appendix C (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[18] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. We further conclude that CVI must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that CVI's prices during the earlier period were unreasonable.[19] We reserve the right to make further adjustments to CVI's prices for the period after May 14, 1994, upon completion of our review of CVI's FCC Form 1200 rate filings.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Cablevision Industries in Orange County, New York, CUID Nos. NY0492, NY0514, NY0717, and NY0821; Warren County, New York, CUID No. NY0322; Ulster County, New York, CUID No. NY0437; Genesee County, New York, CUID No. NY0878; and Chautauqua County, New York, CUID No. NY1384, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filings submitted by Cablevision Industries with respect to Orange County, New York, CUID Nos. NY0492, NY0514, NY0717, and NY0821; Warren County, New York, CUID No. NY0322; Ulster County, New York, CUID No. NY0437; Genesee County, New York, CUID No. NY0878; and Chautauqua County, New York, CUID No. NY1384, for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justify the maximum price in each franchise area set forth in Appendix C (plus franchise fee) for Cablevision Industries' cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Cablevision Industries shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[20] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix C (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that Cablevision Industries shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Cablevision Industries shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Orange County, New York, CUID Nos. NY0492, NY0514, NY0717, and NY0821; Warren County, New York, CUID No. NY0322; Ulster County, New York, CUID No. NY0437; Genesee County, New York, CUID No. NY0878; and Chautauqua County, New York, CUID No. NY1384, for the period beginning May 15, 1994, to reduce the monthly charge for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix C (plus franchise fee).

15. IT IS FURTHER ORDERED that Cablevision Industries shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Valid Complaint Filed with FCC	Date First Complaint Served
NY0322	02/25/94	02/22/94
NY0437	02/25/94	02/25/94
NY0492	02/24/94	02/21/94
NY0514	02/24/94	02/22/94
NY0717	11/29/93	11/18/93
NY0821	02/03/94	02/01/94
NY0878	02/28/94	02/25/94
NY1384	02/24/94	02/28/94

Appendix B

CUID No.	Date First 393 Filed with FCC
NY0322	06/27/94
NY0437	06/27/94

[18] This finding is based solely on the representations of CVI listed in paragraph 5, *supra*, and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[19] We reviewed CVI's FCC Form 1200 rate filings and confirmed that CVI calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[20] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

NY0492	03/21/94
NY0514	03/28/94
NY0717	05/16/94
NY0821	03/04/94
NY0878	03/28/94
NY1384	03/28/94

Appendix C

CUID No.	Actual CPS Price	Maximum Reasonable Price
NY0322	$11.20	$10.51
NY0437	$10.45	$ 8.78
NY0492	$12.75	$11.77
NY0514	$12.75	$11.78
NY0717	$12.75	$11.71
NY0821	$12.75	$11.56
NY0878	$10.40	$ 9.54
NY1384	$ 9.75	$ 8.78

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

February 27, 1995

GTE California, Inc. Files Petition for Declaratory Ruling Related to Pending Cerritos Tariff Investigation (CC Docket No. 94-81)

Pleading Cycle Established

COMMENTS DUE: March 10, 1995
REPLIES DUE: March 15, 1995

On February 8, 1995, GTE California, Inc. (GTECA) filed a petition for declaratory ruling pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2. GTECA alleges that Apollo CableVision, Inc. (Apollo) has sought damages in California state court based on a number of contracts to which Apollo and GTECA agreed in 1987. GTECA seeks a declaratory ruling on whether Apollo's request for damages before a state court might result in a violation of Section 203 of the Communications Act. The contracts at issue in Apollo's state court action also raise issues relevant to a pending investigation of GTECA's tariffs for the provision of cable transmission service in Cerritos, California. *See* GTE Telephone Operating Companies, CC Docket No. 94-81, 9 FCC Rcd 3613 (Com. Car. Bur. 1994).

Interested parties filing comments or oppositions to this petition are invited to do so no later than **March 10, 1995**. Parties filing replies may do so no later than **March 15, 1995**. An original and five copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, International Transcription Service, Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Finally, one copy must be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Copies of these petitions and other related documents may be obtained from International Transcription Service. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Steven Spaeth, Tariff Division, Common Carrier Bureau at (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bresnan Communications Company	CUID Nos. MI0027, MI0144, MI0181, MI0194

Benchmark Filing to Justify Cable Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 1995; Released: February 28, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price Bresnan Communications Company ("Bresnan") was charging for its cable programming service ("CPS") tier in Iron Mountain, Michigan, CUID No. MI0027; Kingsford, Michigan, CUID No. MI0144; Baraga, Michigan, CUID No. MI0181; and Forsyth, Michigan, CUID No. MI0194. Bresnan has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Bresnan's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Bresnan asserts that its monthly CPS price is justified by its benchmark filing because this price is less than or equal to the maximum permitted charge. Upon review, we have found no apparent errors that would result in Bresnan's CPS tier price exceeding the maximum permitted price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Bresnan Communications Company in Iron Mountain, Michigan, CUID No. MI0027; Kingsford, Michigan, CUID No. MI0144; Baraga, Michigan, CUID No. MI0181; and Forsyth, Michigan, CUID No. MI0194 ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-176

In re Application of

RICHARD RICHARDS File No. BRTTL-921116IG

For Renewal of License of
Low Power Television
Station K33CG,
Sierra Vista, Arizona

Appearances

Thomas Schattenfield, Esq. and *Gerald P. McCartin, Esq.* on behalf of Richard Richards; *Charles E. Dziedzic, Esq.* and *Robert A. Zauner, Esq.* on behalf of the Mass Media Bureau.

DECISION

Adopted: March 30, 1995; Released: April 11, 1995

By the Review Board: MARINO (Chairman) and GREENE.

Board Member GREENE:

1. Before the Review Board is the *Initial Decision* of Administrative Law Judge Richard L. Sippel, 9 FCC Rcd 3604 (1994) (*ID*), which denies the license renewal application of Richard Richards for a low power television station in Sierra Vista, Arizona. Also before the Board are Richard Richards' Exceptions to this *Initial Decision* and the Mass Media Bureau's Reply. The Board heard oral argument on January 20, 1995. For the reasons set forth below, we are granting Richards' exceptions and reversing the *ID*.

BACKGROUND

2. Richards was convicted of the felony of possessing with intent to distribute less than 50 kilograms of marijuana (Marijuana, I) and cultivating marijuana on federal property in violation of Title 21, United States Code, sections 841(a)(1), 841(b)(1)(D) and 841(b)(5). Bureau Exh. 3. This conviction followed his May 4, 1992 guilty plea to one count of an indictment brought in the United States District Court for the District of Arizona. Bureau Exh. 2. In his plea agreement, Richards stated:

> [O]n or about July 25, 1991, defendant Richard Richards was in knowing possession of between 37 and 41 marijuana plants, some plants being grown on his property and some plants being grown on National Park Service property. Richards was the owner of these plants, he knew them to be marijuana plants and he intended to distribute the plants or the processed marijuana derived from these plants to another person or persons.

Id. at 6, *quoted in ID*, 9 FCC Rcd at 3605 ¶ 7. For first offenders like Richards, the maximum sentence for this offense is five years incarceration; there is no minimum. 21 U.S.C.S. § 841(b)(1)(D) (Law. Co-op Supp. 1994). Richards was placed on probation for five years with the following conditions: that he serve seven months under house arrest and participate in such substance abuse and mental health counseling and substance abuse testing as directed by the U.S. Probation Office. As a further condition, Richards was directed to refrain from violating any laws. Bureau Exh. 3. As part of the plea agreement, Richards also consented to a judgment in a concurrent civil forfeiture action and forfeited his 82.5 acre ranch known as the Montezuma Ranch, including his house. Bureau Exh. 2 at 2; Richards Exh. 1 at 4 ¶ 8. In September, 1992 the Court issued an order "that the Court's sentence in the above-captioned matter is not intended to affect the defendant's ability to apply for or receive federal benefits, including but not limited to the federal benefit of owning and operating television stations licensed by the Federal Communications Commission (F.C.C.)." Richards Exh. 28.[1]

3. While under house arrest, on November 16, 1992, Richards applied to renew the license for station K33CG. The Commission set this application for hearing to determine whether Richards possesses the necessary qualifications to be a licensee in light of his conviction and, in light of the evidence adduced, whether grant of his renewal application would serve the public interest. The Commission assigned the burdens of proceeding and proof to Richards. *Hearing Designation Order, Richard Richards*, 8 FCC Rcd 4339 (1993) (*HDO*).

4. Richards was the only witness at the hearing. He explained in his written direct testimony:

> I would like to make clear that I have never sold marijuana or any other illegal drug. I did grow some marijuana on my property and on adjacent federal property, but this was solely for personal use. Some of the marijuana plants seized in connection with my arrest were transplanted plants of a friend of mine. My friend had asked me to tend some of his plants and to return them to him when they had matured. I agreed to do this. I understand that this agreement constitutes an intent to "distribute" marijuana.

Richards Exh. 1 at 3-4 ¶ 7. On cross examination, Richards testified he had been buying and using marijuana for about twenty-five years, tr. 73, 109, and admitted that he had taken marijuana on a trip sometime before his 1991 arrest for himself and a traveling companion. Tr. 90. He testified

[1] The Court was explicit, however, that this order would not prohibit any federal agency from taking action it deemed appropriate in light of Richards' conviction. Richards Exh. 28.

he had grown marijuana in the amounts stated in his plea agreement "one time. Prior to that, the only time throughout the twenty years were isolated incidences of a plant here in this year, two plants in this year, a plant here, a plant there over the years. The majority of time, I purchased marijuana." Tr. 76. He said he first grew marijuana on the National Park Service land adjacent to his ranch during the summer of 1991 "so I wouldn't subject the property to be lost in case anything ever happened and I grew it in that volume to supply my needs because the price of marijuana had more than doubled and tripled from my older purchases in prior years." Tr. 154.[2] He explained that, as a heavy user, he had developed a tolerance to marijuana, so potency was important to him. Richards Exh. 30. When the plants would have matured, he had planned to discard the male plants to prevent pollination and to remove many of the leaves of the female plants. *Id.*; Joint Exh. 1. In his view, this would maximize the potency of the female plants. Richards Exh. 30. He intended to give his friend ten of the mature female plants and keep the rest, about nine, for himself. *Id.* From his testimony that he smoked about four pounds a year (tr. 78) and the Joint Stipulation that one plant would produce about 5/8 of a pound of usable marijuana composed of about equal amounts of buds and leaves, it appears that these plants would have supplied him for well over a year.

5. At the time of his arrest Richards grew vegetables on the Montezuma Ranch, where he was then living, and on three rented parcels of land. *ID*, 9 FCC Rcd at 3604 ¶ 5; tr. 146-47. Richards testified on cross-examination that, when the police searched his ranch at the time of his arrest, he had approximately 18 scales, including a scale for measuring very light weight items exactly, and a heat sealer for sealing items in plastic. Tr. 46. He had a pager in his car that belonged to his cousin, Terrence Clemmons, from whom he had bought marijuana over the years and an additional pager belonging to the salesman of a pager company. Tr. 47, 75. Also at the ranch were a mobile telephone belonging to Clemmons, to which Richards had access, and another belonging to a girlfriend residing at the ranch. Tr. 48-49. Marijuana debris from what Richards described as fallen leaves from the one-time drying of one plant were found in a half bathroom in a part of the house where renovations had not been completed. This was closed off pursuant to a court order issued during his divorce proceeding to protect his children from accidents when they visited. Tr. 52-53.

6. In addition to admitting his marijuana use prior to his conviction, Richards says he has been rehabilitated: "I have not used [marijuana] since December 31, 1991. I have never used any other illegal drug." Richards Exh. 1 at 4 ¶ 10. On cross-examination, he explained his last marijuana use was on New Years Eve, some five months after he was arrested and charged by the County, because he had

> found out they were filing on me federally . . . . They hadn't done it yet, but I mean, the word was they're dropping the case in the county and they're filing on me on the Federal level and then I was told I would be under urine analysis and New Year's Eve of that day was the last day of -- my blowout day of consumption of all I could ingest for that New Year's Eve.

Tr. 112. At his arraignment, the judge "told me not to use marijuana and to return at all court dates or otherwise a warrant would be issued for my arrest." Tr. 106. All subsequent urinalysis tests other than two reflecting the New Year's Eve blowout have been negative. *ID*, 9 FCC Rcd at 3606 ¶ 14; Richards Exh. 27. Richards submitted to several tests before his conviction and nine random tests thereafter. According to Richards' Probation Officer, the results of nine randomly submitted urinalysis samples "have all been negative (meaning no evidence of drug use by Mr. Ricahrds [sic]). Currently, Mr. Richards appears to be complying with his conditions of probation and has posed no significant supervision problems to date." Letter from DiMaria to McCartin of 11/26/93, Richards Exh. 27.

7. To support his claimed rehabilitation, he also explained that he "became born again" in the religious sense in the mid-1980's.

> Since that time, as my faith has grown and deepened, I have come to realize that my use of marijuana, while strictly for personal purposes, was wrong. I had justified marijuana use by the fact that it did not harm anyone else or myself. . . . I regret my marijuana use, but I am now focused on the present and future, not on the past.

Richards Exh. 1 at 4-5 ¶ 11. According to members of the community who know him through religious, broadcasting or other activities and who share his interest in religious broadcasting, Richards has acknowledged his past conduct was wrong. "He knows that he did wrong and has so stated. He is doing everything in his power to rectify that." Statement of Dwight Collins, Richards Exh. 4 at 1. "The point is that he has admitted to himself and others that what was done was wrong and is willing to take his medicine." Statement of Claude R. Fowler, Richards Exh. 7 at 2. "Everyone has hidden secrets that he doesn't share. However, Mr. Richards has been very truthful and honest since I first met him. He never tried to cover up his past problems with marijuana and how he had convinced himself it was alright to use it. He admits that being on the drug had an effect on his decisions. He is off the drug and is one of the hardest working, almost driven, people I have ever met." Statement of James L. Hawk, Jr., Richards Exh. 8 at 2. "I appreciated the fact that Mr. Richards didn't lead me to believe he was perfect when he could have said nothing and I would have never known anything about him." Statement of Evelyn W. Love, Richards Exh. 16 at 2. "The good part is that Mr. Richards confesses his past and is working hard doing right in the present." Statement of James L. Mitchell, Richards Exh. 17 at 2. "We are convinced he regrets his past actions and has no intention to repeat them." Statement of Earl W. Shannon, Richards Exh. 19 at 1. "He uses himself as an example and the mistakes he has made in his life -- marijuana plants -- as to how the Lord and the religious television network has helped him grow." Statement of Greg D. Rowles, Richards

[2] Richards understood that his property would be jeopardized if marijuana were found growing there. Tr. 77, 155.

Exh. 23 at at 2. "He [Richards] believed that marijuana had a purpose in the natural scheme and he used it accordingly. He told me that he has not used marijuana for one and one-half years and that he has come to the understanding that nothing created by God is inherently evil or wrong and that any act that violates the law is always wrong. . . . Richard has not always been honest about everything, as honesty relates to marijuana and the law; however, he has always been honest in his dealings with me and others in the community and church. Richard has repented of his transgression of the law and has allowed God to use the ordeal of being arrested and losing his ranch to increase his zeal to proclaim the love, mercy and forgiveness of God to his fellow man." Statement of Lawrence H. Wicke, Richards Exh. 25 at 1-2.

8. Richards submitted a total of twenty-six statements, including those cited above, given under penalty of perjury from persons in the community who attest to his good character.

> In its cumulative effect, these unrebutted statements establish that even after the conviction, Richards has a reputation for truthfulness and honesty among the listeners of Station K33CG. They also show that Richards has a religious orientation which is reflected in the station's programming. Those religious interests are also shared by the persons submitting the testimonials.

ID, 9 FCC Rcd at 3605 ¶ 11. *See, e.g.*, Statements of Leona Erber, Richards Exh. 6 at 1 (Richards "has a reputation for honesty in the community"); Curtis Quick, Richards Exh. 18 at 1-2 (Richards "is well known in this area for his honesty and integrity").

9. Richards and the Bureau stipulated that there is no record at the Commission of any complaints or citations for rule violations involving the operation of station K33CG, and the *ID* so found. Tr. 177-78; 9 FCC Rcd at 3605-06 ¶ ¶ 10, 12. The station retransmits the programming of the Trinity Broadcasting Network, a religious network with affiliates throughout the United States. *Id.* at 3605 ¶ 10. There are no employees.

INITIAL DECISION

10. The *ID* concluded that Richards had not met his burden of proof and denied Richards' renewal application for three reasons: (1) Richards' uncontested felony conviction, which was treated as "multiple felony convictions," 9 FCC Rcd at 3604 ¶ 3, 3610 ¶ 30; (2) "egregious conduct" related to the drug conviction, *id.* at 3608 ¶ 25; and (3) the Commission's grave concern about drug trafficking. *Id.* According to the *ID*, Richards' conduct was egregious because he misused federal land for his criminal enterprise; he was himself a heavy marijuana user; and he dried leaves in his home where children visited and he had boarded off a room. *Id.* at 3608 ¶ 24. Also according to the *ID*, "The evidence of record establishes that Richards was engaged in a systematic criminal enterprise in the growing and harvesting of marijuana on federal property" and was convicted on strong evidence of trafficking, including possession of the "tools of the trade." *Id.* at 3609 ¶ 26 (footnote omitted). Indeed, the *ID* said that, although "[t]he evidence of record would not support a finding of a distribution of marijuana beyond the admitted distributions of marijuana to a friend and to the traveling companion," *id.* at 3606 ¶ 16, "circumstantial evidence in the aggregate support the equally plausible inference that Richards, his friend and his companion were not the only users, or intended users, of the marijuana that was grown by Richards."[3] *Id.* at 3607 ¶ 17. "For example," the *ID* reads in the footnote to this point, "Richards has denied that there were any sales of marijuana to his cousin and there was no direct proof of any such sales. However, there was ample opportunity for Richards to have also supplied his cousin with marijuana that was grown on the ranch. And Richards did not produce his cousin as a corroborating witness." *Id.* n.9 (record citations omitted).

11. The *ID* gave minimal weight to Richards' mitigation showing regarding station operations. *Id.* at 3606 n.5. It discounted Richards' rehabilitation showing about his discontinued marijuana use, never having used other illegal drugs, and stronger religious beliefs. Although "[t]here is no evidence to rebut Richards' assertion that he has not used marijuana since December 31, 1991, or that Richards has ever used any illegal substance other than marijuana," *id.* at 3606 ¶ 14, the *ID* found this unpersuasive in light of Richards' past heavy use of marijuana and his failure to give it up, even after his arrest, until forced to do so by the threat of imprisonment. *Id.* The *ID* faulted Richards for failing to provide probative evidence from a drug counselor on the status of his rehabilitation. *Id.* It also discounted Richards' character evidence because the statements Richards submitted came from listeners who share Richards' religious beliefs and did not establish his reputation for truthfulness and honesty in the general community. *Id.* at 3605 ¶ 11 and n.3 .

12. The *ID* also found that Richards lacked credibility in his testimony. "Richards has a clear motive to attempt to fabricate business needs or to offer seemingly innocent reasons for otherwise incriminating evidence that was found at the scene of the crime" in order "to put [his] drug trafficking conviction in the most favorable light." *Id.* at 3607 ¶ 18. During cross-examination Richards was asked the purpose of one of his scales, the triple beam scale. He explained that it is "designed to, as close as possible, measure the weights of something very light-weight or very exactly." Tr. 46. He later explained that the scale is to establish accurate weights for the packaging into which light weight items such as garlic might be placed. Tr. 80. He also answered, "That's right," when asked whether he was in the business of packaging small packages of garlic and explained he packaged many items such as herbs for personal use "so that the bugs didn't get into it" or for sale. Tr. 80-81. The *ID* found that, while marijuana was measured in gram weights and Richards was a heavy user, there were no business records or other corroboration for Richards' explanation of a legitimate business purpose requiring gram measurements. 9 FCC Rcd at 3607 ¶ 20. "Finally, the record does not establish that the gram scale was used exclusively for the verifying of garlic shipments

[3] The *ID* found, "Richards had control of more than thirty seven [sic] marijuana plants. Also considered is the evidence of the scales that are designed to measure small amounts, the marijuana debris, the mobile telephones, the pagers, the heat sealers and the admission that other plants had been grown by Richards." *ID* at 3606-07 ¶ 17.

and was never used for the weighing of marijuana in connection with a purchase or sale. Therefore, there is no reasonable basis for accepting the truth of Richards' testimony that the gram scale was used solely for innocent purposes," *id.* (emphasis added), a circumstance which might have been exculpatory.

13. The *ID* found that "Richards also lacked credibility in his testimony about a ledger that was under his control and that was seized at the time of his arrest." *Id.* at 3607 ¶ 21. According to the *ID*, Richards first said he was not aware of any ledger or record showing sales of marijuana but, when shown Bureau Exh. 4, testified he had seen it when his criminal lawyer showed it to him around the time of his arrest. Richards testified he had never before been asked about the handwriting on the document and was not sure whether it was his:

> I mean, I had this question in the beginning and I would -- I don't -- for the record, I don't want to say that it's not mine, but I don't want to be too quick to say that it was mine because I'm not sure.

Id. at 3607 ¶ 21, quoting from tr. 58. He then testified he was more than fifty percent sure the entries were in his handwriting (tr. 71) and that they showed what he had paid his cousin for marijuana. Tr. 75. With respect to Bureau Exh. 5, a supplement to Bureau Exh. 4, the *ID* found Richards "flippantly" said to assume the handwriting was his. 9 FCC Rcd at 3608 ¶ 21. The *ID* also found, "Richards insisted that he only purchased marijuana and that he never sold marijuana." *Id.* Based on Richards' testimony appearing between tr. 54 and 82, the *ID* said:

> It was a patent disregard of his duty to be forthright as a witness for Richards to hedge the identification of his handwriting. Such circumventing of the truth in this hearing is empirical evidence that supports the finding of future unreliability that is inferred from the criminal convictions. Thus, we see that Richards' future communications with the Commission cannot be trusted.

Id. at ¶ 22.

14. The *ID* also found evidence in the record that tended to negate mitigation. One matter concerns Richards' use of federal land for growing marijuana to avoid forfeiture of his own land if he were caught. This was characterized as "a propensity to deal dishonestly with government property for his own advantage." *Id.* at 3607 ¶ 19. The other concerns what the *ID* treated as "Richards' uncorroborated testimony" about the origin and use of about one hundred marijuana plants Richards had disposed of shortly before his arrest. *Id.* Richards testified that he had worked with the U.S. Drug Enforcement Administration (DEA) around 1988-89 in an effort to apprehend Mexican drug smugglers. The smugglers were apprehended in an operation that took just a few days, and twenty-some marijuana bales left on Richards' land were confiscated. In 1991 Richards found plants five to twelve inches high growing in the area where the bales had been. He speculated that seeds had dropped from the plants and lain dormant until he began farming newly-cleared land close to the area and water from his sprinklers caused them to sprout. Tr. 155-56. Richards said he found the plants about the first of July and dug them out on the fourth because he wasn't sure of the quality and didn't want the risk. Tr. 155-57, 160, 162, 164. After giving "[n]o credence . . . to this imaginative, uncorroborated and self-serving account," 9 FCC Rcd at 3606 n.7, the *ID* further found that Richards' account of this incident adversely affected his credibility because, if Richards had worked with the DEA, he did so at a time when he was heavily using marijuana and growing it on federal land and there was no record evidence he had disclosed his activities to the DEA. "Richards has thus shown a capacity to grow marijuana on federal property and to use marijuana heavily while he is engaged in a government related enterprise or activity." *Id.* at 3607 ¶ 19. From these incidents, the *ID* concluded, "This is substantial evidence of a negative trait for truthfulness and reliability." *Id.*

15. From all the facts, the *ID* concluded:

> But there is not substantial evidence in the record showing that Richards will not return to using marijuana while he holds a Commission license or that he will be a truthful and reliable licensee. His felonious activities with respect to using federal land to provide a source for marijuana, his continued use of marijuana after arrest, his failures to disclose to the DEA, a federal agency, his incredible uncorroborated testimony, and his adamant refusal to identify his own handwriting on Bureau exhibits outweigh the character testimony and reinforce the adverse inferences that flow from Richards' felony conviction.

Id. at 3610 ¶ 28. It found no mitigation under the evaluation factors set forth in the *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1227-28 (1985) (*Character Policy Statement)* (subsequent history omitted). The *ID* closed by saying that Richards'

> multiple felony convictions while a Commission licensee coupled with his demonstrated propensity to use federal property in a criminal enterprise . . . demonstrate a propensity for untruthfulness and dishonesty in dealing with federal property. That conclusion is further supported by Richards' continual use of marijuana while a Commission licensee for six months after his arrest and the incredible, uncorroborated and uncooperative testimony in this case. . . . [I]t is concluded that it would not be in the public interest for Richards to be trusted further with a broadcasting license.

9 FCC Rcd at 3610 ¶ 30 (citation omitted).

EXCEPTIONS

16. Richards takes strong exception to the *ID* on both factual and legal grounds, documenting several factual errors in the *ID* and challenging its legal analysis. He takes particular exception to the speculation that he was involved in a more serious dereliction than that shown in the record and that for which he was convicted and sentenced by the United States District Court. Richards also excepts to the emphasis placed on his marijuana use, for which he was not convicted because this, too, was before the court and is subsumed by the judge's orders.

17. Richards complains about the treatment of his mitigation and rehabilitation evidence, arguing that the opinions of his character witnesses were inappropriately

devalued simply because they share a religious belief with him. He emphasizes that he is not relying on religious belief to enhance his credibility but on "the opinions of members of the community who know him and have dealt with him, who also happen to be religious people." Brief at 10. He calls "outrageous" the finding that there is no evidence of his substance abuse cure when the record contains the statement of his probation officer showing that random drug tests have been negative and that Richards appears to be complying with his conditions of probation. Brief at 10-11.

18. Richards takes strong exception to the characterization of his explanation about the 100 destroyed plants as "imaginative, uncorroborated and self-serving" and to the adverse credibility findings flowing therefrom. He says that the Bureau actively investigated this case and confirmed to Richards' counsel, if not clearly to the presiding officer, that Richards did work for the DEA, which corroborates his explanation about how the plants came to grow on his land. Brief at 11 n.15.

19. Richards also criticizes the treatment of his testimony about what appeared to be two ledger sheets dating from *circa* 1977-80, Bureau Exhs 4, 5, which been found among Richards' papers at the ranch. At oral argument, counsel for Richards argued that, because of their age, the ledgers had nothing to do with the offense for which Richards was convicted and should not have been introduced into evidence. Tr. 259. In exceptions, Richards complains that too much attention was directed to Richards' uncertainty about whether the handwriting was his and not enough attention was given to his effort to reconstruct what the ledgers represented, which Richards characterizes as "forthcoming." Brief at 15. He also faults the adverse credibility findings based on these ledgers, including the implication that these ledgers impeach his testimony about being a buyer, not a seller, and the speculation that there was ample opportunity for Richards to supply his supplier with marijuana.

20. According to Richards, his conviction, standing alone, does not warrant denial of his renewal application under the Commission's character policy, including its policy about drugs. Contrasting his circumstances to the applicant's in *Williamsburg County Broadcasting Corp.*, 5 FCC Rcd 3034 (1990), *license revoked in South Carolina Radio Fellowship*, 6 FCC Rcd 4823 (1991), he argues that his conduct does not involve the "'systematic devotion to a criminal enterprise' or reflect a 'callous disregard for the welfare of fellow citizens' . . . [or] amount to 'an egregious crime against society'" found there . Brief at 18. From Richards' point of view, only in the most technical sense does his conduct, growing a friend's plants with intent to return them for no consideration, constitute an agreement to distribute marijuana. Possession of the small number of marijuana plants for which he was convicted is treated relatively leniently under the statute to reflect the legislative judgment that, "at the 50-plant level the defendant was likely operating as a trafficker in illegal drugs." *U.S. v. Holmes*, 961 F.2d 599, 602 (6th Cir.), *cert. denied*, 121 L. ed. 2d 168, 113 S. Ct. 232 (1992), and his own lenient sentence reflects the *de minimis* nature of his crime. "If he were the danger to society targeted by the Commission's drug policy, he would have served significant time. Moreover, the additional weapon in the district court's arsenal -- recommendation of deprivation of federal benefits -- was not invoked against Richards." Brief at 20. "*[South Carolina] Radio Fellowship* presents a classic case of preying on fellow citizens through drug trafficking, the specific evil targeted by the *Public Notice*. Richards' case does not." Brief at 22.

21. Richards also argues that the record contains ample evidence of mitigation and rehabilitation:

> Richards has not been involved in any wrongdoing since December 31, 1991. His low power television station has not been cited for any FCC violations. (Tr. 177-78). Twenty-six members of the Sierra Vista community, all of whom had knowledge of his marijuana offense, unequivocally testified as to Richards' good character and outstanding reputation in the Sierra Vista community for truthfulness and honesty.

Brief at 22-23. In addition, "As a result of his conviction, Richards has lost his home and the ranch on which he grew produce to make a living. He has been punished enough. . . . Given the presence of these mitigating factors, the fact that Richards regrets his use of marijuana and has broken the habit, and the nature of the misconduct, the renewal application must be granted." Brief at 23.

22. The Bureau disagrees with Richards' analysis. Although agreeing at oral argument that "many of the things that were in the initial decision were probably not necessary to be in the initial decision," tr. 269, the Bureau does not see these as affecting the outcome. The case is straightforward: "Richards' conviction, regardless of the number of plants involved or the number of persons to whom he intended to distribute his illegal drugs, standing alone, warrants his disqualification under this [drug policy] *Public Notice*. " Reply Brief at 6. As part of his plea agreement, Richards agreed he owned the plants, knew them to be marijuana, and intended to distribute the plants or the processed marijuana from them to another. This is trafficking, and, while trying to minimize his offense, Richards has never denied trafficking in marijuana. Thus, the Bureau sees no distinction between the facts in *Williamsburg* or *Radio Fellowship* and the instant case.

23. In addition, the Bureau disagrees that the record contains ample evidence of mitigation and rehabilitation. Pointing to the relevant factors from the *Character Policy Statement*, the willfulness, frequency, currentness, and seriousness of the misconduct, the Bureau argues:

> Here there can be no dispute. Richards willfully cultivated marijuana with the intent to distribute it and was, himself, a heavy user of marijuana . . . . Every time Richards "lit-up" he knowingly violated the law. Furthermore, Richards' violations are current. He was arrested on July 25, 1991 and convicted in July 1992. Finally, it is clear that the Commission considers "drug trafficking" by its licenses to be a serious matter. Thus, on every element that the Commission has said it will consider in evaluating the likelihood of future misconduct, Richards' conduct is wanting.

Reply Brief at 7-8. The Bureau also disagrees that Richards' claim to rehabilitation has merit.

> While it is true that he has not used drugs since [December 31, 1991], the motivation for his forbearance may be other than his rehabilitation. . . . [T]he

> evidence here is that Richards did not give up his use of marijuana until compelled to do so under the threat of going to jail.

Id. at 8. Thus, it recommends that Richards' renewal application be denied.

DISCUSSION

24. The ultimate issue before the Board is whether, in light of his 1992 conviction for possessing marijuana with the intent to distribute it, Richard Richards has the requisite character qualifications to be a licensee. *See* 47 U.S.C. § 308(b). We find that he does on the basis of the facts of this case.

25. The Commission in its *Character Policy Statement* has made clear that our purpose is not to pass moral judgment on applicants but, instead, to determine whether the public interest will be served by granting the application before us. This is the standard of the Communications Act. *See* 47 U.S.C. § 309(a). Because the Commission's rules and policies give flesh to the public interest standard, the Commission has generally narrowed its interest in an applicant's character to evaluating "the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and [Commission] rules and policies" if granted a license. *Character Policy Statement,* 102 FCC 2d at 1183. Traits that are predictive of an applicant's truthfulness and reliability are ordinarily the focus of inquiry. *Id.* at 1189, 1190-91; *see id.* at 1196 n.40, 1197 n.42. Felony convictions are relevant, for any felony conviction reflects on an applicant's propensity to obey the law, a trait predictive of reliability as a licensee. *Policy Regarding Character Qualifications in Broadcast Licensing,* 5 FCC Rcd 3252, 3252 ¶ 4 (1990) (*Modified Character Policy Statement*). Convictions for offenses involving false statement, dishonesty or fraudulent conduct additionally reflect on an applicant's propensity for truthfulness. *See Character Policy Statement,* 102 FCC 2d at 1196-97 & n.40 (analogizing the FCC's concern with truthfulness to the concern with witness credibility in Rule 609 of the Federal Rules of Evidence).

26. The Commission has also posited that "nonbroadcast misconduct so egregious as to shock the conscience and evoke almost universal disapprobation . . . might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee . . . ." *Id.* at 1205 n.60. Drug trafficking may fall into this category. *Radio Fellowship,* 6 FCC Rcd at 4823 ¶ 5; *see* Public Notice, Commission Clarifies Policies Regarding Licensee Participation in Drug Trafficking, 4 FCC Rcd 7533, 7533 & n.1 (1989) (drug trafficking is "a matter of the gravest concern"). The Commission has explained:

> Felonious drug trafficking, which involves systematic devotion to a criminal enterprise, . . . is within the category of egregious' non-FCC offenses entailing such callous disregard for the welfare of fellow citizens as to place at issue the perpetrator's qualifications to be or remain a broadcaster. A doubt certainly exists as to whether someone recently found guilty of such an egregious crime against society would faithfully serve the public in exercise of the vast and important discretion that this agency entrusts to licensed broadcasters.

Williamsburg County Broadcasting, 5 FCC Rcd at 3035 § 14 (footnote omitted); *see HDO,* 8 FCC Rcd at 4339 ¶ 3. Thus, where the conduct is egregious, the Commission may find a lack of character without specifically finding a nexus between the felony conviction and the applicant's truthfulness and reliability. *Williamsburg* at 3037 n.4.[4]

27. Whether or not a felonious drug conviction reflects egregious misconduct, the Commission will entertain and weigh a significant showing of mitigating circumstances or rehabilitation. *See generally Radio Fellowship,* 6 FCC Rcd at 4824 ¶ 6; *cf. RKO General, Inc. (WAXY-FM),* 5 FCC Rcd 642, 644 (1990). The relevant factors include the willfulness, frequency and currency of the misconduct; the seriousness of the misconduct; the nature of participation of managers and owners; the efforts made to remedy the wrong; the applicant's record of compliance with the Commission's rules and policies; and rehabilitation. *Modified Character Policy Statement,* 5 FCC Rcd at 3252 ¶ 5; *Character Policy Statement,* 102 FCC 2d at 1227-28; *see* Public Notice, 4 FCC Rcd at 7533 4th ¶ and n.1 (extenuating and mitigating circumstances are relevant; *Policy Statement* factors cited). Factors relevant to an applicant's rehabilitation include whether the applicant has been involved in significant wrongdoing since the alleged misconduct occurred; the elapsed time since the misconduct; the applicant's reputation for good character in the community; and meaningful measures taken by the applicant to prevent the future occurrence of misconduct. *Modified Character Policy Statement,* 5 FCC Rcd at 3254 n.4 . Deterrence of future misconduct is also a consideration. *Character Policy Statement* at 1228 ¶ 103; *see KQED, Inc.,* 5 FCC Rcd 1784, 1785 ¶ 7 (1990) (loss of station will deter recurrence of broadcast-related misconduct); *recon. denied,* 6 FCC Rcd 625, 626 ¶ ¶ 9-10 (1991) (same); *United Broadcasting Co., Inc.,* 100 FCC 2d 1574, 1585 ¶ 24 (1985) (deterrence from massive loss calculated to impress on licensee the seriousness of misconduct should be weighed); *WIOO, Inc.,* 95 FCC 2d 974, 984 (1983) (lost opportunity to acquire uncontested FM was significant deterrent); *Faulkner Radio, Inc.,* 88 FCC 2d 612, 618 (1981) (nonrenewal had substantial deterrent impact).

28. Permeating the *ID* in this case is the view that Richards' misconduct transcended the single criminal count to which he pleaded and was, instead, "a systematic criminal enterprise in the growing and harvesting of marijuana on federal property" that involved distribution beyond growing some marijuana plants for a friend, for which he was convicted, and sharing marijuana with a traveling companion, which he admitted.[5] Richards complains that the *ID* made overly broad findings by considering details about his conviction that were sub-

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[4] Repeated, willful adjudicated violations of law "amounting to a flagrant disregard for complying with the law" also might indicate that an applicant lacks the requisite traits. *Character Policy Statement,* 102 FCC 2d at 1205 n.61. Although much is made of Richards' long-term use of marijuana, the Bureau has not argued and the *ID* does not rely on footnote 61.

[5] 21 U.S.C. § 841(b)(4) (Law. Co-op Supp. 1994) provides that

sumed by the sentencing order in the District Court and speculating about the breadth of Richards' activities beyond what is shown on the record. Richards would limit inquiry to the sentencing order, which prescribed less than the maximum possible sentence, and the judge's order stating that the sentence imposed was not intended to affect Richards' ability to receive federal benefits, including a Commission license. Bureau Exh. 3; Richards Exh. 28. In Richards' view these orders reflect the judge's evaluation of the seriousness of Richards' conduct, which the Commission should not second-guess. We agree that we are not here to relitigate Richards' guilt or innocence or redetermine his sentence. Nonetheless, just as the sentencing court can consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction"[6] if supported by reliable and specific information,[7] this Commission can consider the context of Richards' misconduct in making the evaluation under the public interest standard. *See generally Radio Fellowship*, 6 FCC Rcd at 4823 ¶ 2 (support found from Initial Decision findings *re* applicant's criminal activities); *see also* Public Notice, 4 FCC Rcd at 7533 (extenuating circumstances relevant); *Modified Character Policy Statement*, 5 FCC Rcd at 3252 ¶ 5 (mitigation factors); *Character Policy Statement*, 102 FCC 2d at 1227-28 (same). Conduct of a similar nature demonstrating a pattern of continuous activity, as was the case in *Radio Fellowship*, is relevant to the Commission's evaluation of Richards' character, if findings are supported by a preponderance of the record evidence.

29. In this case, however, the *ID* finds a pattern of conduct on the basis only of speculation or possibility. This is not sufficient. Richards was convicted of a single count of possessing marijuana with intent to distribute. There were no multiple felony convictions, contrary to the *ID*, 9 FCC Rcd at 3604 ¶ 3, 3610 ¶ 30, and no charges of additional drug-related misconduct.[8] Without any nexus in time to Richards' conviction or any record evidence whatsoever, the *ID* hypothesizes that Richards could have supplied his cousin, his own source, with marijuana he grew. The *ID* also relies on Richards' "admission that other plants had been grown." 9 FCC Rcd at 3606-07 ¶ 17. If this is based on Richards' admission that he occasionally grew a plant or two for his personal use, it does not show a pattern of trafficking, which involves distributing a controlled substance to others.[9] If this is based on Richards' acknowledgment that he destroyed the 100 or so plants he found growing on his property, it is not based on sufficient evidence that Richards was responsible for the plants or even knew about them until a few days before he destroyed them. The *ID* characterizes Richards' testimony about the plants as "imaginative, uncorroborated and self-serving" and gives it "[n]o credence." 9 FCC Rcd at 3606 n.7; *see id.* at 3607 ¶ 19 ("uncorroborated testimony"), 3609-10 ¶ ¶ 28, 30 ("incredible uncorroborated" testimony). The Commission should not accept representations that are "at best highly implausible and at worst utterly ridiculous." *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985). But, according to Richards, Bureau counsel was in contact with officials in Arizona and confirmed to Richards' counsel that Richards did, indeed, work for the Drug Enforcement Administration. Brief at 11 n.15.[10] The Bureau agreed in its Reply Brief at 9 that it had confirmed Richards' DEA involvement with DEA officials but apparently made this point below only through its hearing strategy, namely, that it did not seek to impeach Richards' testimony about his DEA cooperation and the origin of the 100 plants.[11] This constructive stipulation that Richards' DEA involvement is unchallenged removes his explanation from the realm of the imaginative and uncorroborated. Furthermore, Richards destroyed the plants before being surprised by the police during the search and seizure which led to his conviction. We find merit to Richards' argument that his destruction of the immature plants was not consistent with knowing involvement in a systematic criminal enterprise involving growing marijuana on federal land or anywhere else. From this record, the fact that Richards found these plants on his land does not establish a pattern of felonious drug-related misconduct on his part.[12]

30. The *ID* also relies on what it characterizes as circumstantial evidence from the "tools of the trade" as further support for the view that Richards was engaged in a systematic criminal enterprise. However, Richards was a

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anyone who distributes a small amount of marijuana for no remuneration shall be treated as provided by the statutory provisions governing simple possession, a misdemeanor, not under the felony provisions of § 841.

[6] 18 U.S.C.A. U.S.S.G. § 1B1.3(a)(2) (West Supp. 1995). *See United States v. Lawrence*, 915 F.2d 402, 406-408 (8th Cir. 1990); *United States v. Ykema*, 887 F.2d 697, 700 (6th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990). *See generally* 18 U.S.C.A. U.S.S.G. § 1B1.2(a) and comment. (n.1) (West. Supp. 1995), which provide that, where a plea agreement contains a stipulation that specifically establishes a more serious crime than the offense of conviction, the sentence is to be based on the guidelines for the more serious offense up to the maximum prescribed by statute for the offense of conviction. The court may also "consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." 18 U.S.C.A. U.S.S.G. § 1B1.4 (West Supp. 1995).

[7] *See generally United States v. Holmes*, 961 F.2d 599, 603 (6th Cir. 1992), *cert. denied*, -- U.S. --, 113 S. Ct. 232, 121 L. Ed. 2d 168 (1992); *United States v. Hewitt*, 942 F.2d 1270, 1274 (8th Cir. 1991); *United States v. Phillippi*, 911 F.2d 149, 151 (8th Cir. 1990), *cert. denied*, 498 U.S. 1036 (1991).

[8] One count dealt with using his ranch in connection with the count to which he pleaded, pursuant to which the Government proposed to seize his property. This count was dismissed, but the ranch was forfeited pursuant to an agreement in the plea.

[9] The misdemeanor nature of possession without an intent to distribute and the lack of any adjudication of the misconduct would preclude consideration of this as a separate and unrelated offense under the *Character Policy Statement*. Further, sharing a small amount of marijuana for no remuneration is not a felony. *See* note 5, *supra*.

[10] Richards also argues that Bureau counsel was in touch with the U.S. Attorney in Arizona but presented no facts contradicting the facts as presented by Richards. Brief at 13 n. 17.

[11] At oral argument, counsel agreed with the Board Chairman's suggestion that this matter could have been better handled by a stipulation so as to avoid any confusion on the ALJ's part. Tr. 266-67.

[12] Had these plants been known to the judge at sentencing and considered relevant, Richards would have been subject to mandatory imprisonment under the Federal Sentencing Guidelines. *See* 18 U.S.C.A. U.S.S.G. Ch.1, Pt.A, intro. comment. (n.4 (d)) (West Supp. 1995); 18 U.S.C.A. U.S.S.G. § 2D1.1(c)(14) and comment. (n.18) (West Supp. 1995); *see generally United States v. Lawrence*, 915 F.2d at 408. Richards argues that all of this information was before the judge at sentencing. Brief at 12.

farmer who grew and sold herbs as well as weightier crops, and whose testimony that these "tools" had farming-related uses is undisputed, although, as the *ID* also notes, uncorroborated by business records. In an urban environment, tools like these might create a stronger presumption of drug trafficking when found in the vicinity of a controlled substance,[13] but where these same tools have a legitimate use, more than their mere presence on the ranch is required to support an adverse presumption that Richards' felonious misconduct is more serious than that for which he was convicted. This record does not show any scales or packaging equipment in the boarded off room where the debris from a single marijuana plant had been found, and no marijuana plants or debris were said to have been found near the location of the scales or packaging equipment.

31. Other than the single incident for which Richards was convicted, there is no reliable evidence that Richards knowingly grew more than a plant or two for his personal use and, perhaps, shared it for no remuneration. This would not be treated as a pattern of felonious misconduct under the criminal statute and is not so egregious as to create the very strong presumption that Richards cannot be trusted to be truthful or reliable as a licensee under footnote 60 to the *Character Policy Statement*. Although the *ID* characterized Richards' trespass on federal land to grow the plants for which he was convicted, his personal heavy consumption of marijuana, and his boarded-up room where the debris of a marijuana plant was found as acts of egregious misconduct, 9 FCC Rcd at 3608 ¶ 24, we must disagree. There is no record contradiction and no impeachment to Richards' testimony that the marijuana debris was from a single plant, and the room where it was found was boarded up pursuant to a court order to protect his visiting children from construction hazards. The use of federal land does not change Richards' basic offense, that of possessing marijuana with intent to distribute, although it could have subjected him to a greater fine than otherwise prescribed for the offense. *See* 21 U.S.C.S. § 841(b)(5) (Law. Co-op Supp. 1994). Richards' personal marijuana use, regardless of the length of time and amount consumed, is not treated as a felony unless there has been a prior conviction, *see* 21 U.S.C.S. § 844 (Law. Co-op Supp. 1994), so cannot be considered part of a pattern of felonious drug misconduct here. Furthermore, because the amount of marijuana involved in the offense for which Richards was convicted and sentenced was less that fifty plants, Richards was not presumed to be a major trafficker under 21 U.S.C.S. § 841 (Law. Co-op Supp. 1994). *See United States v. Holmes*, 961 F.2d 599, 602 (6th Cir. 1992); *United States v. Osburn*, 955 F.2d 1500, 1508 (11th Cir. 1992) (this cut-off point in sentencing reflects Congress' belief "that growing a large number of plants (capable of large scale distribution) is an exponentially more severe offense than growing a small number), *cert. denied*, – U.S. –, 113 S. Ct. 223, 121 L. Ed. 2d 160, and *cert. denied*, – U.S. –, 113 S. Ct. 290, 121 L. Ed. 2d 215 (1992); *United States v. Webb*, 945 F.2d 967, 969 (7th Cir. 1991), *cert. denied*, 502 U.S. 1116 (1992). Simply stated, this record does not establish a "systematic devotion to a criminal enterprise" and "callous disregard for the welfare of fellow citizens," the bases for finding drug-related misconduct to be egregious in *Williamsburg*, 5 FCC Rcd at 3035 ¶ 14, and *Radio Fellowship*, 6 FCC Rcd at 4823-24 ¶ 6.[14]

32. However, we disagree with Richards that his conviction should be taken lightly, for "any felony conviction is relevant to character qualifications." *Radio Fellowship*, 6 FCC Rcd at 4824 ¶ 6, citing *Modified Character Policy Statement*, 5 FCC Rcd 3252 ¶ 4. Richards' violation of the law reflects adversely on his reliability for he knowingly and willfully violated 21 U.S.C.S. § 841 (Law. Co-op Supp. 1994), and he did so when he was the licensee of K33CG. He used federal land to grow his marijuana to avoid the repercussions of his wrongdoing, an adverse reflection on his personal candor.[15] His conviction was only about two and one-half years before his renewal hearing and three years before the *ID*, so our post-conviction experience is limited and there has been no opportunity to observe his post-probation conduct. On the other hand, we do have a record of his actual stewardship of K33CG during the period of his marijuana problems. That record shows no complaints and is entitled to weight as a mitigating factor. *Modified Character Policy Statement*, 5 FCC Rcd at 3252 ¶ 5; *RKO General, Inc. (WAXY-FM)*, 5 FCC Rcd 642, 644 ¶ 20 (1990); *Character Policy Statement*, 102 FCC 2d at 1227-28. Indeed, the Commission's actual experience with Richards as a licensee is a good predictor of Richards' future stewardship. We also have the recommendation of the judge that Richards not be denied federal benefits because of his conviction. Although this recommendation is not binding on the Commission, it reflects the judge's evaluation of the seriousness of Richards' misconduct and in that respect is entitled to note as we weigh Richards' misconduct under the public interest standard.[16]

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[13] *See, e.g., U.S. v. Echeverri*, 982 F.2d 675 (1st Cir. 1993), *cited in ID*, 9 FCC Rcd at 3609 ¶ 26.

[14] In *Radio Fellowship*, the Commission revoked the license of a daytime AM station whose president and 50 % owner had been convicted of possessing cocaine with intent to distribute and conspiring to commit the offense and sentenced to five years imprisonment under the statutory provision applicable to intended distribution of five or more kilograms of cocaine or 1,000 or more marijuana plants. *See* 21 U.S.C.S. § 841(b)(1)A)(ii) (Law. Co-op Supp. 1994). The principal had turned to drug selling to cover his living expenses when he experienced financial difficulties with the station. He entered into a joint venture to sell cocaine, bringing to the venture access to inside information about police drug raids, and his advance warnings of drug raids twice saved his partner from apprehension. He reimbursed law enforcement officials for these tips. On at least one occasion he used the radio station as the place to meet his drug customers. Drug users called him at the station telephone number. This went on for a period of 8 or 9 months. 6 FCC Rcd 340, 341-42 (ALJ), *aff'd* 6 FCC Rcd 4823 (1991). The principal also admitted he had deliberately misrepresented a fact to a judge to reduce his prison sentence. 6 FCC Rcd at 4824 ¶ 7.

[15] Under F.R.E. 609(a)(2), a witness' credibility can be attacked with evidence that the witness has been convicted of a felony or misdemeanor involving dishonesty or false statement. This usually involves some element of deceit, untruthfulness, or falsification. According to McCormick on Evidence § 42, a physical attempt to remain undetected does not alone make a crime one of dishonesty, although there may be a showing that the crime rested on facts establishing deceit, untruthfulness, or some other element of active misrepresentation.

[16] Judicial authority to recommend denial of federal benefits under the Anti-Drug Abuse Act of 1988 is noted in Policy

33. We are concerned, however, that Richards broke the law to further his personal marijuana habit. Thus, his control of his marijuana use is very important in predicting whether he will have the same incentive to engage in felonious misconduct in the future and whether he can be expected to exercise the discretion expected of a licensee. While Richards' personal marijuana use does not support a finding of egregious misconduct,[17] it is highly relevant to assessing Richards' future operation in the public interest.

34. Richards challenges the *ID*'s failure to credit his claim that he has been cured or has his habit under control. The *ID* faulted Richards for failing to provide expert evidence from a drug counselor,[18] but there is evidence in the form of a letter from his probation officer stating that Richards had been tested several times up until the time of the hearing and that "[t]he results of these tests have all been negative (meaning no evidence of drug abuse by Mr. Ricahrds (sic))." Richards Exh. 27. While an expert opinion might have assisted the Commission in predicting the future, the actual drug test results show that, at present (at least until the hearing record closed), Richards is not using marijuana. Further support is found in statements that Richards has told people familiar with his marijuana use of his changed attitude about using a prohibited substance and his intent to obey the law. *See* ¶ 7, *supra*. The *ID* and the Bureau make the good point that Richards' reform involuntarily resulted from the threat of incarceration if he continued using marijuana while under the jurisdiction of the federal criminal justice system. But, many changes in life are brought about by involuntarily facing the consequences of one's lifestyle. Richards' sincerity is supported by the fact that he can change, as shown by the drug test results, and his statements to others about his intent. It is buttressed by the substantial price he has already paid for his misconduct, i.e., the loss of his 82.5 acre ranch, which has had a strong deterrent impact.[19] *See generally Character Policy Statement*, 102 FCC 2d at 1228 ¶ 103; *KQED, Inc.*, 5 FCC Rcd at 1785, 6 FCC Rcd at 626; *United Broadcasting Co.*, 100 FCC 2d at 1585; *WIOO, Inc.*, 95 FCC 2d at 984; *Faulkner Radio, Inc.*, 88 FCC 2d at 618. It is reinforced by the provision for a mandatory minimum sentence of imprisonment for 15 days if he is convicted of even simple marijuana possession in the future. *See* 21 U.S.C.S. § 844 (Law. Co-op Supp. 1994).

35. The *ID* gave little weight to Richards' evidence of his reputation for good character in the community because most of the statements Richards submitted addressed his reputation in the community of people among whom he is well known rather than the community where he lives. Richards points out that these statements come from people who know him, have dealt with him, and who know of his conviction, and, he argues, they should not be discounted simply because these people also listen to his programming and share his religious beliefs. We agree with Richards. The *Modified Character Policy Statement* allows evidence of an applicant's character reputation in the community as part of a rehabilitation showing but does not define "community." *See* 5 FCC Rcd at 3254 n.4 . F.R.E. 608(a) allows a showing of a witness' general and established reputation in any substantial community of people among whom he is well known, and it additionally allows opinion evidence based on experience with the witness and observation of his conduct. *See* McCormick on Evidence, 4th Ed. § 43. We see no reason for a more restrictive approach here.[20]

36. The *ID* also gave little credence to Richards' testimony about mitigation and rehabilitation because of findings that Richards lacked credibility, and it included adverse credibility findings about Richards' propensity for truthfulness. Richards' testimony about the 100 plants, which he gave on cross-examination, played a large part in this credibility assessment. Given that this testimony is unchallenged and that Bureau counsel had verified Richards' DEA involvement with DEA officials, we must disregard the finding that Richards' explanation lacked credibility. We also must disregard the additional finding that Richards' account lacked credibility because, if he had worked with the DEA, he was at the same time using marijuana and growing it on federal park land. Richards admitted he was using marijuana at the time -- he admitted he had been a long-time user -- but the only evidence that he grew marijuana on federal land is his conviction for growing it two years later. Credibility findings must have support in substantial record evidence. *Sun Over Jupiter Broadcasting, Inc.*, 8 FCC Rcd 8206, 8207-08 ¶ 7 (Rev. Bd. 1993), and cases cited therein.

37. The finding that Richards lacked credibility in his testimony about two ledger pages, the other major basis for the *ID*'s adverse credibility finding, also does not withstand scrutiny. The sheets of paper were introduced into evidence apparently to impeach Richards' overall credibility as a witness, including his mitigation and rehabilitation testimony. Because of their age -- Richards' testimony that they date back to the 1977-80 time period was unchallenged -- they have no discernible connection to the conviction before us other than that they were found among Richards' papers when his house was searched. Under rule 608(b) of the Federal Rules of Evidence, they would not be admissible to prove an act of misconduct back then, and they are themselves not probative of Richards' truthfulness or untruthfulness as a witness because the misconduct they are said to reflect does not involve any dishonesty or false statement, the criterion for probing a witness' credibility on the basis of unadjudicated miscon-

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Statement, 4 FCC Rcd at 7533, as part of the national effort to eradicate illicit traffick in narcotics, drugs, and other controlled substances.

[17] In Public Notice, the Commission encourages licensees to offer drug rehabilitation programs and directed them to prohibit the use of drugs by employees while at work. It does not require that licensees fire employees for using drugs. *See* 4 FCC Rcd at 7533.

[18] There is no evidence in this record as to whether Richards was required to see a counselor by his probation officer or whether he saw one on his own.

[19] The *ID* minimized the impact of the forfeiture because Richards' mortgages on the ranch were likely honored by the government after forfeiture. 9 FCC Rcd at 3605 n.1. When considering the deterrent effect of the loss of a broadcast station, the Commission does not diminish the impact by the amount the former licensee can recover for the physical plant. The deterrent effect of the loss of Richards' ranch because of his wrongdoing should be treated comparably.

[20] However, the opinion expressed in Richards Exh. 16 is based on insufficient observation to be credited.

duct. McCormick on Evidence, 4th Ed. § 41. Nonetheless, they were admitted into evidence and Richards' credibility was found lacking not only because he denied ever having sold marijuana but also because of his testimony about the ledgers themselves. In the first place, that the ledgers reflect anything other than what Richards said they reflect, i.e., his purchases of marijuana, cannot be concluded from the face of the two sheets of paper. The suggestion that Richards may have sold marijuana in the remote past has no place in this proceeding absent a showing by a preponderance of the record evidence of a pattern of misconduct, which, as discussed above, is not supported on this record. In addition, although Richards never said conclusively that the handwriting was his, he neither denied it nor disavowed responsibility for the sheets of paper. Instead, he explained them and their contents to the presiding officer. The finding that Richards breached his duty of forthrightness because he hedged identifying handwriting as his on thirteen-year-old papers is an overstatement. It does not support the finding of Richards' future unreliability that is drawn from it.

CONCLUSION

38. When this case is stripped of the unsupported adverse credibility findings in the *ID* and the unsupported view that Richards' misconduct was part of a broader criminal enterprise, the decision must turn on Richards' compliance with Commission requirements during the past license term and on the sufficiency of his rehabilitation showing to overcome the adverse impact of his conviction. The call is a close one, for the Commission has made clear its concern about felonious drug trafficking, and at least with respect to supporting his marijuana habit, Richards has been willing to violate the law. Nonetheless, on balance, we conclude that Richards has met his burden of persuading the Commission that he is qualified for renewal of the K33CG license and that renewal would serve the public interest. He has an unblemished broadcast record. His wrongdoing, while serious, did not involve the station, did not include preying on others, and was not considered serious enough by the District Court to warrant a recommendation that any federal benefits be denied. Although Richards used marijuana for a few months after his arrest, he has not used it since realizing the consequences of his habit. He has paid the heavy price of the loss of his ranch. He has admitted his wrongdoing to the Commission and members of his community. He has a good reputation for truthfulness in the community. We caution Richards, however, that future adjudicated misconduct may require a different result.

39. ACCORDINGLY, IT IS ORDERED That the license renewal application of Richard Richards (File No. BRTTL-921116IG) for station K33CG, Sierra Vista, Arizona, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of	CSR-4425-M
Northwest Indiana	MI0881
Public Broadcasting, Inc.	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: April 3, 1995; Released: April 11, 1995

By the Cable Services Bureau:

1. On October 5, 1992, the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) became law.[1] On March 11, 1993 the Commission adopted a *Report and Order* to implement the mandatory broadcast signal carriage ("must-carry") provisions of the Cable Act.[2] The must-carry rules are applicable to non-commercial educational television broadcast stations ("NCE's"). On December 8, 1994, Northwest Indiana Public Broadcasting, Inc., ("NIPB") licensee of Station WYIN (Educ., channel 56), Gary, Indiana, filed a Petition for Declaratory Ruling Under Section 5 of the 1992 Cable Act ("Petition") alleging that Cable Properties Associates, operator of Michiana Cablevision ("Michiana"), improperly denied carriage of WYIN's signal on Michiana's cable system serving New Buffalo, Michigan. NIPB requests that the Commission order Michiana to carry WYIN's signal. No opposition to NIPB's Petition was filed.

2. Under the 1992 Cable Act and the Commission's must-carry rules, cable operators are required to carry the signals of qualified local NCE's.[3] To be considered a qualified local NCE, a station must be licensed to a principal community whose reference point is within 50 miles of the principal headend of the cable system on which it seeks carriage, or its Grade B service contour must encompass the principal headend of the cable system.[4]

3. NIPB claims that the Michiana system's principal headend located at latitude 41°48'00" longitude 86°32'05" is within 50 miles of WYIN's community of license and is within WYIN's Grade B service contour. WYIN therefore is said to be a qualified local NCE entitled to carriage on Michiana's cable system. We find, based on our review of the Grade B service contour map in WYIN's station license file at the Commission, that WYIN's Grade B service contour does not encompass the Michiana system's principal headend. However, we also find that WYIN's community of license, Gary, Indiana, whose reference point is latitude 41°35'59" longitude 87°20'07", is within 50 miles of the Michiana system's principal headend located at Three Oaks, Michigan.[5] According to our calculations, Gary, Indiana, is 43.7 miles from Three Oaks, Michigan. We conclude, therefore, that WYIN is a qualified local NCE entitled to carriage on the Michiana cable system.

4. Accordingly, the petition filed December 8, 1994, by Northwest Indiana Public Broadcasting, Inc. IS GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. § 535) of the Communications Act of 1934, as amended, and Cable Properties Associates dba Michiana Cablevision IS ORDERED to commence carriage of Station WYIN sixty (60) days from the release date of this Order on its system serving New Buffalo, Michigan. This action is taken by the Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993). *See also Clarification Order*, 58 FR 32449 (June 10, 1993). 47 U.S.C. § 535. *Compare with Turner Broadcasting System, Inc. v. Federal Communications Commission*, 114 S. Ct. 2445 (1994) (remand of District Court opinion that must-carry provision of 1992 Cable Act is constitutional).

[3] A cable operator of a system with 12 or fewer usable activated channels is required to carry the signal of one qualified local NCE, an operator with a system of 13 to 36 usable activated channels is required to carry the signal of at least one, but not more than three, qualified local NCE's, and an operator with a system of greater than 36 usable activated channels is required to carry the signal of each qualified local NCE requesting carriage.

[4] 47 C.F.R. §76.55(b)(1).

[5] In its letter to Michiana requesting carriage, attached as Exhibit A to its Petition, NIPB states that Gary, Indiana is the City of license for WYIN. In its letter responding to NIPB's request for carriage, attached as Exhibit B to NIPB's Petition, it appears that Michiana mistakenly denied NIPB's carriage request based in part on the fact that the distance between Three Oaks, Michigan, the location of Michiana's principal headend, and Cedar Lake, Indiana, the location of WYIN's transmitter, was more than 50 miles. However, the relevant measurement for determining whether a station is a qualified local NCE is the distance between the cable system's principal headend and the reference point of the station's community of license, as defined in Section 76.53 of the Commission's rules. *See* Section 615(l)(2)(B) and 47 C.F.R. §76.55(b)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cable Television Association of
Georgia, et al.,
Complainants

v. PA 95-007

BellSouth Telecommunications, Inc.,
Respondent

ORDER

Adopted: April 4, 1995; Released: April 11, 1995

By the Chief, Accounting and Audits Division:

1. On March 28, 1995, Cable Television Association of Georgia, et al. (CTAG) filed a motion to dismiss with prejudice its pole attachment complaint against BellSouth Telecommunications, Inc. (BellSouth) and terminate the above-captioned proceeding. CTAG states that to avoid the expense and uncertainty of litigation, CTAG and BellSouth have determined to compromise and settle the 1995 pole rate claims at issue in the complaint in this proceeding. CTAG further states that dismissal of this complaint will affect no other party and will serve the public interest by eliminating the need for unnecessary litigation and the concomitant expenditure of time and resources by the Commission and the parties.

2. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's rules , 47 C.F.R. §§ 0.91 and 0.291 that GTAG's motion to dismiss IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-74

In the Matter of

Amendment of Section 73.202(b), RM-8153
Table of Allotments,
FM Broadcast Stations.
(Yermo, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 5, 1995; Released: April 11, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 2483 (1993), issued in response to a petition filed on behalf of Antelope Broadcasting Co., Inc. ("petitioner"), permittee of Station KYHT(FM), Channel 287A, Yermo, California, proposing the substitution of Channel 287B1 for Channel 287A at Yermo, and modification of its authorization accordingly. Petitioner filed supporting comments in response to the *Notice*. Comments were also filed by KHWY, Inc. ("KHWY"), licensee of Station KRXV(FM), Channel 251B, Yermo, to which petitioner responded. Petitioner subsequently filed a request for withdrawal of the *Notice of Proposed Rule Making*.[1]

2. Following the filing of the instant rule making proposal, the Commission amended its Rules to permit, *inter alia*, modification of FM authorizations through a "one-step" application process. *See, FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993). Thus, a petitioner having submitted a proposal that upon the effective date of the new rules could be entertained through the application process, is permitted to withdraw its petition for rule making and submit its proposal in the form of an application. In this instance, on December 23, 1994, petitioner filed a one-step application pursuant to Section 73.3573(a)(1) of the Commission's Rules to upgrade the facilities of Station KYHT(FM) at Yermo, California (File No. BMPH-941223IF).

3. In view of the above, and in accordance with Commission policy, we will grant petitioner's request for withdrawal of the *Notice of Proposed Rule Making* herein.[2]

4. Accordingly, IT IS ORDERED, That the petition for rule making filed by Antelope Broadcasting Co., Inc., to substitute Channel 287B1 for Channel 287A at Yermo, California, and to modify the authorization of Station KYHT(FM) (RM-8153), IS DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information regarding the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The filing of the motion to withdraw obviates the need to consider KHWY's comments in this proceeding.

[2] Pursuant to the requirements of Section 1.420(j) of the Commission's Rules, petitioner provided a statement that neither it, nor its principals, has or will receive any monetary or other consideration in exchange for withdrawing its expression of interest in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PARAGON CABLE

Appeal of Local Rate Order of the
Consolidated Cable
Communications Commission
for Portland, Multnomah County, and
Linnton, Oregon Franchise Areas

ORDER

Adopted: February 28, 1995; Released: March 1, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On April 13, 1994, Paragon Cable ("Paragon"), the franchisee in the above matter, filed an Appeal of a local rate order adopted March 14, 1994 by its franchising authority,[1] the Consolidated Cable Communications Commission ("CCCC").)[2] On April 25, 1994, the CCCC filed a Reply to Paragon's Appeal.

2. In its local rate order, the CCCC established regulated rates for Paragon's basic cable service and associated equipment and installation charges for its Portland, Multnomah, and Linnton franchise areas, as provided by the Cable Television Consumer Protection and Competition Act of 1992.[3] The CCCC's local rateorder determined that Paragon's basic service rate was reasonable because it was below its maximum permitted rate.[4] In addition, the CCCC accepted as reasonable those equipment and installation charges which were below Paragon's maximum permitted rate, but ordered reductions in the rates Paragon charges for addressable converters, manual converters, remotes, and changes of service because these were all priced above Paragon's maximum permitted rate. Paragon was ordered to refund to subscribers those equipment and installation charges since September 1, 1993 which were in excess of its maximum permitted rates. This refund liability, Paragon argues, is in excess of permitted levels.

3. The central issue presented in Paragon's Appeal involves the CCCC's failure to allow Paragon to offset certain charges in excess of its maximum permitted rates with undercharges in other services it offered which were below its maximum permitted rate.[5]

II. STANDARD OF REVIEW

4. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.[6] In ruling on an appeal of a local rate order, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[7] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering a local rate order.[8] If the Commission reverses a franchising authority's decision, it will not substitute its own decision, but instead it will remand the issue to the franchising authority with instructions for its resolution.[9] The three issues under consideration in the instant appeal are discussed in the ensuing section of the Order.

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[1] On July 13, 1994, Paragon also filed a Request for Emergency Stay of the Local Rate Order, which the Commission granted pending review of Paragon's Appeal. *See* Paragon Cable, 9 FCC Rcd 4091 (1994).

[2] Effective July 1, 1994, the Consolidated Cable Communications Commission changed its name to the Mt. Hood Cable Regulatory Commission. For clarity's sake, the MHCRC will be referred to throughout this Order as the CCCC.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment, and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] As part of the rate review process, Paragon submitted an FCC Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") to the CCCC on November 15, 1993. Subsequently, Paragon submitted two revised FCC Form 393s, one on January 7, 1994 and one on February 13, 1994. Local franchising authorities review the information contained in the FCC Form 393, or its successor forms, in order to determine cable operators' maximum permitted rates for basic service, associated equipment, and installations under the Commission's rate regulations. *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5770 (1993) (*"Rate Order"*).

[5] In reviewing Paragon's FCC Form 393, the CCCC made two revisions to Paragon's equipment and installation rate calculations. First, the CCCC contended that certain labor hours which Paragon allocated to equipment costs should have been allocated to installation costs. Second, the CCCC contended that Paragon should not have included any federal or state income tax liability in its equipment cost calculations, because Paragon does business as a partnership, and thus is not subject to income taxation. However, Paragon stated in its Appeal that it "is not asking for a reversal of the CCCC's . . . position" with regard to these computational revisions. Paragon believes that these revisions will not have an impact on overall system revenue if it is allowed to offset certain charges in excess of its maximum permitted rates with undercharges in other services it offered which were below its maximum permitted rate. As noted in paragraph 9, *infra*, Paragon is permitted to offset overcharges in this manner.

[6] 47 C.F.R. §76.944.

[7] *Rate Order* at 5731 ; Third Order on Reconsideration in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) (*"Third Order on Reconsideration"*).

[8] *Id.*

[9] *Id.*

III. DISCUSSION

5. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[10] FCC Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

6. The operator's maximum permitted rates are derived by completing Parts II and III of the FCC Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.[11] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the FCC Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from calculation of an hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 Cable Act.[12] Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed under our rules.[13]

7. If a franchising authority does not dispute the bases for the figures presented in a cable operator's FCC Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installations at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by FCC Form 393.[14]

8. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.[15] If an operator's aggregate revenues computed from its actual rates exceeded its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.[16] If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by Paragon should be calculated based on this method.

9. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.[17] For instance, in this case, the CCCC may not order Paragon to set its programming, equipment, or installation rates below maximum permitted levels. Furthermore, the CCCC must offset or reduce any refunds it may order with any undercharges in other services offered by Paragon which were below its maximum permitted rate.[18] According to Paragon, the CCCC has directed Paragon to charge less than its maximum permitted levels for certain components of its regulated service and to issue refunds without regard to the fact that some of Paragon's rates are below maximum permitted levels. We are remanding this case to the CCCC so that it can reconsider its ruling in a manner consistent with our findings.

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[10] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under FCC Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[11] An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[12] *See* Communications Act, § 623(b), 47 U.S.C. § 543(b).

[13] If a franchising authority required an operator to set its rates for equipment and installations below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installations at levels below actual cost.

[14] An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

[15] *See* 47 C.F.R. § 76.942.

[16] *See Third Order on Reconsideration* at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).")

[17] *See Rate Order* at 5731; *Third Order on Reconsideration* at 4346. *See also* TCI Cablevision of North Central Kentucky, Inc., DA 94-1479 (Cab. Serv. Bur., released December 14, 1994).

[18] *See Third Order on Reconsideration* at 4353.

10. Accordingly, IT IS ORDERED that the local rate order is REMANDED to the Consolidated Cable Communications Commission for resolution in accordance with the terms of this Order.

11. IT IS FURTHER ORDERED that our stay of the local rate order, which was granted pending the resolution of this appeal, is hereby VACATED.

12. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 28, 1995

Released: March 1, 1995

Eric Breisach, Esq.
Howard & Howard
The Kalamazoo Building, Suite 400
107 West Michigan Avenue
Kalamazoo, MI 49007-3956

Dear Mr. Breisach

This letter is in response to your letter of February 17, 1995 requesting a waiver of the requirement that FCC Form 1205 be filed within 60 days after the end of the operator's fiscal year. You noted that several of your clients were experiencing difficulty complying with this requirement within the prescribed time frame. You also asserted that many companies are unable to close their accounting records for two to three months after year-end. You stated that requiring an operator to file a form 1205 under such circumstances would require the operator to rely on estimated and potentially unreliable information. Accordingly, you suggested that the 60-day deadline be waived and the filing period be extended to 120 days.

Form 1205 is required to be filed by an operator under several different circumstances. The instructions to the Form 1205 require the operator to file the Form to update regulated equipment and installation charges on an annual basis. This update process requires the operator to file the Form 1205 with the local franchising authority (or the Commission where it is certified to regulate basic tier service) within 60 days of the end of the operator's fiscal year.

Based on the assertions you have made, the Bureau approves your request for a waiver of this requirement subject to the following conditions. This waiver shall be for 30 days beyond the current 60 day requirement and shall be applicable to all cable operators that are required to file the Form 1205. The operator must notify the local franchising authority (or the Commission where it is certified to regulate basic tier service) that it intends to avail itself of this waiver. This notification must be accompanied by a copy of this letter and a written assurance that strict compliance with the 60-day requirement is not feasible. The written assurance may simply be in the form of a brief explanatory letter. This waiver is limited to fiscal year 1995 and should not be read as a waiver of any other requirement related to the filing of the Form 1205, of the Cable Television Competition and Consumer Protection Act of 1992 or any of the Rules governing cable service.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bresnan Communications Company	CUID Nos. MI0247, MI0772, MI1558

Benchmark Filing to Justify Cable Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1995; Released: March 2, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price Bresnan Communications Company ("Bresnan") was charging for its cable programming service ("CPS") tier in Ishpeming Township, Michigan, CUID No. MI0247; Sands, Michigan, CUID No. MI0772; and Zeeland, Michigan, CUID No. MI1558. Bresnan has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Bresnan's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Bresnan asserts that its monthly CPS price is justified by its benchmark filing because this price is less than or equal to the maximum permitted charge. Upon review, we have found no apparent errors that would result in Bresnan's CPS tier price exceeding the maximum permitted price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Bresnan Communications Company in Ishpeming Township, Michigan, CUID No. MI0247; Sands, Michigan, CUID No. MI0772; and Zeeland, Michigan, CUID No. MI1558 ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Oregon, Inc. CUID No. OR0105
Jackson County, Oregon

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1995; Released: March 2, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the price TCI Cablevision of Oregon, Inc. ("TCI") was charging for its cable programming service ("CPS") tier in Jackson County, Oregon, CUID No. OR0105, on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against TCI, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. The complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation.[3] CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. In this case, TCI's rate justification indicates that as of September 1, 1993, it only offered one tier of service in Jackson County, Oregon, CUID No. OR0105. The channel line-ups and rate cards that TCI submitted support this assertion.

4. The complaints under consideration here were filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaints and TCI's response, and we conclude that the complaints challenge only basic rates, not CPS rates. Although the complainants indicate that the rates challenged violate the Commission's rules, the specific information provided by the complainants indicate that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaints do in fact challenge CPS rates, the complainants may file a petition for reconsideration providing information adequate to support their challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaints filed prior to May 14, 1994, against the cable programming service price charged by TCI Cablevision of Oregon, Inc., in Jackson County, Oregon, CUID No. OR0105, ARE DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).
[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.
[3] Cable Act of 1992, Section 623(a)(1), 47 U.S.C. § 543(a)(1).
[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Nebraska, Inc. CUID No. NE0009
City of Broken Bow, Nebraska

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1995; Released: March 2, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price TCI Cablevision of Nebraska, Inc. ("TCI") was charging for its cable programming service ("CPS") tier in Broken Bow, Nebraska, CUID No. NE0009, on the ground that the complaint concerns rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaint filed against TCI, while asserting that it challenges CPS rates, challenges only rates for basic service, not for CPS. The complaint therefore does not trigger the Commission's jurisdiction, and it is accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation.[3] CPS includes all video programming that is not on the basic servicetier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. In this case, TCI's rate justification indicates that as of September 1, 1993, it only offered one tier of service in Broken Bow, Nebraska, CUID No. NE0009. The channel line-ups and rate cards that TCI submitted support this assertion.

4. The complaint under consideration here was filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaint and TCI's response, and we conclude that the complaint challenges only basic rates, not CPS rates. Although the complainant indicates that the rates challenged violate the Commission's rules, the specific information provided by the complainant indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If the complaint does in fact challenge CPS rates, the complainant may file a petition for reconsideration providing information adequate to support his challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaint filed prior to May 14, 1994, against the cable programming service price charged by TCI Cablevision of Nebraska, Inc., in Broken Bow, Nebraska, CUID No. NE0009, IS DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).
[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.
[3] Cable Act of 1992, Section 623(a)(1), 47 U.S.C. § 543(a)(1).
[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Post-Newsweek Cable, Inc. CUID No. IA0084
Sioux City, Iowa (Sioux City, IA)

Benchmark Filing to Justify Cable
Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1995; Released: March 2, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price Post-Newsweek Cable, Inc. ("Post-Newsweek") was charging for its cable programming service ("CPS") tier in Sioux City, Iowa, CUID No. IA0084. Post-Newsweek has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Post-Newsweek's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Post-Newsweek asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would require a recalculation of Post-Newsweek's maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Post-Newsweek Cable, Inc. in Sioux City, Iowa, CUID No. IA0084 ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waco Cablevision	CUID No. TX0230
Waco, Texas	(Waco, TX)

Benchmark Filing to Justify Cable Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1995; Released: March 2, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider complaints about the price Waco Cablevision, Inc. ("Waco Cablevision") was charging for its cable programming service ("CPS") tier in Waco, Texas, CUID No. TX0230. Waco Cablevision has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Waco Cablevision's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Waco Cablevision asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would require a recalculation of Waco Cablevision's maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Waco Cablevision, Inc., in Waco, Texas, CUID No. TX0230 ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suburban Cable TV Co., Inc. CUID Nos. PA0103,
Manor Township, Pennsylvania, PA2556
Town of East Drumore, Pennsylvania

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: March 1, 1995; Released: March 2, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the prices Suburban Cable TV Co., Inc., ("Suburban") was charging for its cable programming service ("CPS") tiers in Manor Township, Pennsylvania, CUID No. PA0103, and in the Town of East Drumore, Pennsylvania, CUID No. PA2556, on the grounds that the complaints concern rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaints filed against Suburban, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. The complaints therefore do not trigger the Commission's jurisdiction, and they are accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. By statute, these channels are not subject to rate regulation.[3] CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. The complaints under consideration here were filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. Suburban filed motions to dismiss the complaints for Manor Township and for the Town of East Drumore on the ground that, in each case, the complaints filed did not pertain to rates for CPS. A review of the Forms 329 filed for the two communities supports Suburban's assertions in its motions to dismiss.

4. Further, based on our review we conclude that the complaints challenge only charges for converter boxes, not CPS rates. Although the complainants indicate that the rates challenged violate the Commission's rules, the specific information provided by the complainants indicates that only converter charges are at issue. When only equipment charges are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission.

5. The Form 329 is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding what elements of cable service are included in CPS. If, however, the complaints do in fact challenge CPS rates, the complainants may file a petition for reconsideration providing information adequate to support their challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaints filed prior to May 14, 1994 against the cable programming service prices charged by Suburban Cable TV Co., Inc., in Manor Township, Pennsylvania, and the Town of East Drumore, Pennsylvania, respectively, CUID Nos. PA0103 and PA2556, ARE DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).
[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.
[3] Cable Act of 1992, Section 623(a)(1),47 U.S.C.5543(a)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-266

In the Matter of

TELEPHONE COMPANY-
CABLE TELEVISION
Cross-Ownership Rules,
Sections 63.54-63.58

ORDER

Adopted: March 1, 1995; Released: March 1, 1995

Comment Date: March 21, 1995
Reply Date: April 11, 1995

By the Chief, Policy and Program Planning Division:

1. On February 28, 1995, Capital Cities/ABC, Inc., and National Broadcasting Company, Inc. (Joint Parties) filed a request for extension of time to file comments in response to the *Fourth Notice of Proposed Rulemaking* (NPRM) in the above-captioned proceeding.[1] Comments are scheduled to be filed by March 6, 1995, and reply comments are scheduled to be filed by March 27, 1995. The Joint Parties request that the deadline for filing comments be extended thirty days, until April 6, 1995.

2. The Joint Parties state that additional time is necessary to allow them to fully address the issues raised in this proceeding. The Joint Parties state that they have not previously participated in the video dialtone proceedings, and that the NPRM raises issues that now require their participation. They argue that in view of the complexity of the questions raised by the NPRM and the importance of developing a complete record, an extension of thirty days will permit them to more fully address the issues, which they will be addressing for the first time.

3. We do not routinely grant extensions of time.[2] In this case, however, we believe that the Joint Parties' input in this proceeding is important. Therefore, in the interest of allowing all parties to more fully address the issues raised in this proceeding, we are willing to grant parties an extension of time in which to file comments and replies. Given that a number of Section 214 applicants propose to provide programming over their video dialtone systems, however, it is critical that we resolve the issues raised in the NPRM as expeditiously as possible. We consequently believe that a thirty-day extension would result in excessive delay. Thus, we grant all parties a fifteen-day extension of time for filing of comments, and extend the filing dates for comments until **March 21, 1995**, and for reply comments until **April 11, 1995**.

4. According, IT IS ORDERED that the Joint Parties' Request for Extension of Time IS GRANTED to the extent provided herein, and otherwise IS DENIED.[3]

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Chief, Policy and Program
Planning Division
Common Carrier Bureau

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[1] In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-226, FCC 95-20 (rel. Jan. 20, 1995), and *Erratum* (rel. Jan. 31, 1995).

[2] 47 C.F.R. § 1.46(a).

[3] This action is taken pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Application of Educational
Broadcasting Foundation, Inc.

For Renewal File No. BRET-920127KG
of License for
Station WLAE-TV
New Orleans, Louisiana

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: March 29, 1995; Released: April 12, 1995

By the Commission: Commissioner Quello concurring in the result.

I. INTRODUCTION

1. The Commission has before it for consideration: (i) a license renewal application for WLAE-TV, New Orleans, Louisiana; (ii) a Petition to Deny timely filed on May 1, 1992, by the National Black Media Coalition ("NBMC"); (iii) an Opposition to the Petition To Deny filed by the licensee; (iv) the licensee's response to a staff letter of inquiry; (v) a Joint Request For Approval of Agreement filed on August 13, 1993, by the licensee and the NBMC; and (vi) an amendment to the Joint Request for Approval of Agreement filed on June 22, 1994.

II. BACKGROUND

2. The NBMC alleges that the challenged station violated our Equal Employment Opportunity (EEO) Rule and policies. Accordingly, it requests that we conduct an investigation of the station's employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*), designate the renewal application for hearing and, thereafter, deny it. The licensee responds that the NBMC has presented no evidence of discrimination, that the records indicate compliance with the Commission's EEO Rule, and that unconditional renewal is warranted.

III. DISCUSSION

3. *SETTLEMENT AGREEMENT.* On August 13, 1993, the NBMC and the licensee filed a Joint Request for Approval of Agreement which requests dismissal of the NBMC Petition to Deny, approval of the settlement agreement, and grant of the renewal application. Pursuant to a staff letter of inquiry, NBMC and the licensee filed an amendment to the settlement agreement on June 22, 1994. We have reviewed the settlement agreement, as amended, pursuant to 47 C.F.R. § 73.3588 and *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants and other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780 (1989) (*Renewal Policies Order*). We find that the settlement agreement, as amended, complies with the Commission's rules and policies. Accordingly, we hereby dismiss the NBMC's Petition to Deny.[1] As is our practice in all cases, we reviewed the station's Equal Employment Opportunity Program and performance pursuant to Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309. We find that the licensee did not engage in affirmative recruitment efforts for a substantial number of its vacancies and failed to maintain adequate records for self-assessment. Therefore, we will grant renewal subject to appropriate remedies and sanctions as discussed below.

4. Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See*, Sections 73.2080(b) and 73.2080(c) of the Commission's Rules, 47 C.F.R. §§ 73.2080(b), 73.2080(c).

5. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When the renewal application fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of remedies or sanctions, such as reporting conditions, renewal for less than a full term, forfeiture or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987); *see also*, 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual, supra.*

6. Review of the licensee's renewal application and inquiry response reveals that the station had 24 hiring opportunities, including 14 for upper-level positions[2] between

[1] Due to the settlement agreement between the parties, the issue of standing is moot.

[2] In response to a staff letter of inquiry dated May 13, 1992, the licensee submitted a listing of each position filled during the three-year period from February 1, 1989, to May 11, 1992, including each position's FCC Form 395-B job classification. We note that the licensee incorrectly listed a production assistant, a tape librarian and a traffic assistant as upper-level technicians.

February 1, 1989, and May 11, 1992.[3] In its renewal application, thelicensee indicated recruitment contact with *The Times-Picayune, The Louisiana Weekly* (Black circulation), and Public Broadcasting System from August 1, 1990, to July 31, 1991. However, the licensee stated in its renewal application that it did not know the number of minority referrals that resulted from these recruitment contacts. In addition, the licensee indicated recruitment contact with six colleges and universities, one of which, Xavier University, is predominantly Black. Contact with these sources resulted in six minority referrals. Additionally, WLAE-TV received one minority referral from current station employees. It appears that the licensee made no further recruitment efforts to contact minority-specific or female-specific sources.

7. In response to our staff letter of inquiry requesting recruitment efforts data, the licensee stated that complete information regarding its referrals as well as applicant and interview pools was "not available." However, review of the inquiry response reveals that WLAE-TV did not actively recruit for ten (42%) of its 24 hiring vacancies. For eight of these positions, the licensee simply stated "Information Not Available." For one of these ten openings, the licensee indicated that it had used only its staff as a recruitment source. For the final opening, the licensee indicated that the position was filled through a transfer from the licensee.[4] For all of these positions, the licensee failed to substantiate any affirmative recruitment efforts. For six of its job openings, the licensee contacted *The Times Picayune*. For four jobs, the licensee contacted *The Times Picayune* and *The Louisiana Weekly*. For one vacancy, it contacted *The Times Picayune, The Louisiana Weekly* and placed an announcement at a university, although it did not specify which university. For another one of its openings, the licensee contacted The Walker Employment Agency. WLAE-TV also contacted a "local TV station" for an additional opening, but did not specify the station in question. Lastly, the licensee contacted the New Orleans Vocational Technical Institute for one vacancy. For the 24 hiring opportunities, WLAE-TV attracted five minority applicants (including four Black applicants and one Hispanic applicant). The Hispanic applicant and one of the Black applicants applied for upper-level positions. The station interviewed the five minority applicants and hired five minorities, including two for upper-level jobs (including one Black applicant and one Hispanic applicant).

8. The station indicated that it established a filing system for tracking EEO practices in April 1990 after consulting with one of its Board members. It also appointed a committee of station managers "to have bi-annual meetings to review all EEO matters and to determine compliance." At its last meeting on May 12, 1992, 19 days before the expiration of the license term and eleven days after the filing of NBMC's petition, WLAE decided to post notices at more predominantly Black universities and to add the NAACP as one of its recruitment sources. In reviewing its previous six-month record, the licensee noted that "on some occasions, there were hirings that did not follow the procedures that already had been set up because a list of strong candidates for those positions was already at hand. It was the decision of the Committee that in the future a more tightly controlled procedure be implemented so that decisions are not made in haste without full adherence to the policy that has been established by the station."

9. Although there are deficiencies in recruitment and self-assessment, we find no substantial and material questions of fact to warrant designation for hearing. *See, Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). Further, because the licensee employed minorities during the license term, we find no evidence of employment discrimination. *See* n.4 *supra*. Accordingly, grant of the station's renewal application is in the public interest.

10. However, we find WLAE-TV's overall recruitment efforts deficient because minorities were absent from a significant number of the licensee's applicant pools and it provided no information on recruitment sources for almost half of its hiring opportunities. The licensee also failed to maintain adequate records for meaningful self-assessment. 47 C.F.R. § 73.2080.[5]

11. In 1994, we adopted a Policy Statement regarding forfeitures to be assessed for violations of our EEO Rule. *Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules*, 9 FCC Rcd 929 (1994) ("EEO Policy Statement"). A court decision issued since the EEO Policy

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These positions are generally classified in the lower-level office and clerical category. *See*, Instructions Form 395-B, Broadcast Station Annual Employment Report. Therefore, absent a showing that these positions are truly managerial in responsibility, we will not treat them as upper-level positions. In addition, the licensee indicated that it used the job titles "Assistant Promotions Director" and "Promotions Assistant" interchangeably to denote an upper-level position filled by a minority female. A review of the job description for this position indicates that it is clerical in nature. For example, one of the responsibilities for this position includes "relief switchboard operator weekly and as needed." Accordingly, we will not treat this position as being in the upper-level category.

[3] The current license term ended on June 1, 1992. The New Orleans Metropolitan Statistical Area (MSA) includes 41.2% females and 32.5% minorities (27.3% Black, 4.1% Hispanic, .9% Asian/Pacific Islander and .2% American Indian). The licensee did not file its 1988 Annual Employment Report. Accordingly, there are no employment data available for that year. In 1989, the station had an overall staff of 39 and an upper-level staff of 33. In that year, the station employed four Blacks (10%), two Asian/Pacific Islanders (5%) and one American Indian (3%) on its overall staff. On its upper-level staff for that year, the station employed two Blacks (6%), two Asian/Pacific Islanders (6%) and one American Indian (3%). In 1990, the station had an overall staff of 34 and an upper-level staff of 28. In that year, the station employed four Blacks (12%), one Hispanic (3%), one Asian/Pacific Islander (3%) and one American Indian (3%) on its overall staff. On its upper-level staff for that year, the station employed three Blacks (11%), one Asian/Pacific Islander (4%) and one American Indian (4%). In 1991, the station had an overall staff of 35 and an upper-level staff of 30. In that year, the station employed two Blacks (6%), one Asian/Pacific Islander (3%) and one American Indian (3%) on its overall staff. On its upper-level staff for that year, the station employed one Black (3%), one Asian/Pacific Islander (3%) and one American Indian (3%). In 1992, the station had an overall staff of 31 and an upper-level staff of 26. In that year, the station employed three Blacks (10%) and one American Indian (3%) on its overall staff. On its upper-level staff for that year, the station employed two Blacks (8%) and one American Indian (4%).

[4] WLAE-TV did not provide any additional details regarding this hire, except that it was a transfer to a partial payroll status.

[5] The licensee is reminded that under our EEO Rule, 47 C.F.R. § 73.2080, it has an affirmative obligation to recruit for females and minorities for each vacancy. To the extent that a licensee fails to do so, female, as well as minority, employment is affected.

Statement indicated that our general policy statement[6] on forfeitures must be put out for notice and comment. *United States Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). While the *USTA* case did not address our EEO Policy Statement, members of the broadcast community have called for the withdrawal of the EEO Policy Statement until it is likewise made available to the public for notice and comment. *See, e.g., Petition for Declaratory Ruling by Eagle Radio, Inc.* (filed August 11, 1994); *Letter from Henry L. Baumann to William E. Kennard*, July 13, 1994. We will respond to these concerns in a separate order. In the meantime, we will utilize our pre-January 1994 process of *stare decisis* by relying upon case precedent to resolve the decisional case.

12. Under our previous forfeiture authority, which was prior to December 1989, we used a process of *stare decisis*. We would analogize the cases based on factors such as, but not limited to, station size, number of hiring opportunities, MSA size, recruitment patterns, applicant and interview pools, assessment and record-keeping. Under this approach, in determining appropriate sanctions and/or remedies, we have carefully considered the facts and circumstances of this case in light of pertinent case precedent. We believe that the record in the instant case is similar to that of the licensee of WSPA/WSPA-FM, Spartanburg, South Carolina, in *Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704 (1990). The licensee therein recruited from local newspapers, five local colleges, the South Carolina state employment service, contacts with local minority leaders and various other persons involved in broadcasting. WSPA/WSPA-FM indicated that out of the 12 possible hires during the reporting period only one minority (Black) was hired. The licensee did not keep adequate records and was unable to indicate how many of its referrals were minorities. Additionally, the licensee was unable to provide data regarding the total number of applicants it interviewed. Minorities constituted 16.0% of the labor force in the Spartanburg, South Carolina MSA, of which 14.8% were Black. In that case, we concluded that the licensee failed to engage in adequate recruitment and conduct meaningful self-assessment of its EEO program, given the lack of minority applicants and hires. The licensee received a $5,000 Notice of Apparent Liability for Forfeiture and reporting conditions.

13. WSPA/WSPA-FM, although issued in 1990, concerned violations that occurred before 1989. Thus, it was decided based on a former forfeiture authority, which was significantly lower.[7] Previously, the forfeiture penalty assessed against a broadcaster could "not exceed $2,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation could not exceed a total of $20,000." In 1989, Congress substantially increased the dollar amounts of our forfeiture authority. Pub. L. No. 101-239, 103 Stat. 2131. Pursuant to Section 503(b)(2), the forfeiture penalty assessed against a broadcaster may "not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act." However, even before our forfeiture authority was expanded in 1989, we assessed substantial fines for EEO recruitment deficiencies. *See e.g., Kansas City Youth for Christ*, 3 FCC Rcd 6866 (1988) (licensee received $10,000 forfeiture, short-term and reporting conditions for failure to self-assess and make any efforts to recruit women or minorities); *In re Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704 (1990) (licensee received $10,000 forfeiture, short-term and reporting conditions where it failed to hire minorities for upper-level positions in a 6 1/2 year period, and did not use recruitment sources which generated minority referrals); *Commission's Letter to John P. Healy, Treasure Coast Radio, Inc.*, 5 FCC Rcd 3745 (1990) (licensee received $10,000 forfeiture and reporting conditions where its recruitment efforts attracted no minority candidates in labor market with a 12.5% Black labor force, and its records did not show any contacts with minority organizations or hires during a two year period). These deficiencies are somewhat more egregious than those in the instant case. Consequently, the amount assessed in the instant case is lower in proportion to our current forfeiture authority ($250,000) than the amount in the cited cases was to our previous forfeiture authority ($20,000).

14. The record in the case of WLAE-TV indicates that the licensee recruited for 14 jobs and that minorities were present in only five overall applicant and interview pools. In addition, only two upper-level applicant and interview pools contained minorities. The licensee hired five minorities (four Blacks and one Hispanic) overall, of which two were for upper-level positions (one Black and one Hispanic). Further, the licensee failed to substantiate any affirmative recruitment efforts for ten of its hiring opportunities. Moreover, the licensee failed to maintain adequate records for meaningful self assessment. WLAE-TV did not keep applicant or interviewee data. Additionally, the licensee could not precisely indicate the sources it contacted for each of its 24 full-time positions.

15. We believe that the facts in the instant case are similar to, but more egregious than, those in WSPA/WSPA-FM. The licensee's failure to maintain complete applicant and interview pool data in view of the high percentage of minorities (32.5%) in its labor force, is more serious than the similar failure by WSPA/WSPA-FM. We believe that maintaining such information would have better enabled the licensee to self-assess the effectiveness of its recruitment efforts. Given the facts of this case, broadcasters' familiarity with our long standing EEO rule, as well as our expanded forfeiture authority in this area, we feel that the circumstances in this case justify the issuance of a Notice of Apparent Liability for $15,000. Accordingly, we will grant renewal subject to reporting conditions and issue a Notice of Apparent Liability for $15,000.

IV. CONCLUSION

16. Upon review of the record and the arguments submitted by all parties, we find no hearings are warranted and that renewal of the license is appropriate. However, we will grant the renewal subject to reporting conditions and

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[6] *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993).

[7] Section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(2), authorizes the Commission to impose monetary forfeitures on broadcast station licensees or permittees for violations of the Act or of regulations promulgated thereunder.

issue a Notice of Apparent Liability for $15,000. In view of the pending transfer of control application for WLAE-TV, we note that upon grant of that application, the transferees shall be responsible for complying with our reporting conditions. *See San Luis Obispo Limited Partnership*, 9 FCC Rcd 894 (1994); *Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989).

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that the Joint Request For Approval of Agreement, as amended, filed by NBMC and the licensee of WLAE-TV IS GRANTED, the settlement agreement IS APPROVED and the Petition to Deny filed by NBMC IS DISMISSED.

18. IT IS FURTHER ORDERED that the license renewal application filed by Educational Broadcasting Foundation, Inc. for Station WLAE-TV IS GRANTED subject to reporting conditions as described herein and, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. § 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $15,000.

19. IT IS FURTHER ORDERED that the licensee of Station WLAE-TV submit to the Commission an original and one copy of the following information on February 1, 1996 and February 1, 1997:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[8]

(b) A list of all employees as of the January 1, 1996, payroll period for the first report and a list of all employees as of the January 1, 1997, for the second report, by job title and FCC job category, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

20. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this *Memorandum Opinion and Order* to all parties.

21. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

22. Should you have any questions regarding this action or require further information concerning employment reports, you may call the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, the licensees may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this Order. Any comments concerning the ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[8] Such a list might start:

1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T
	1 Hispanic male	National Hispanic Media Coalition
	1 Black female	Urban League

Sources contacted - Local newspaper, A.W.R.T., National Hispanic Media Coalition and Urban League

Selected - Hispanic male, National Hispanic Media Coalition, (08/19/95)

Before the
Federal Communications Commission
Washington, D.C. 20554

WT Docket No. 95-35

In the Matter of the

Application of

GEORGE E. RODGERS
Downingtown, Pennsylvania

For Amateur Station
and Operator Licenses

HEARING DESIGNATION ORDER

Adopted: March 31, 1995; Released: April 12, 1995

1. Mr. George E. Rodgers has applied for renewal of his amateur service station and operator licenses. For the reasons stated below, his application will be designated for a hearing to determine whether the application shall be granted.

2. On April 26, 1994, Mr. Rodgers plead guilty to and was convicted upon four counts of violating Section 6301(a) [corruption of minors] of the Pennsylvania Criminal Code and upon four counts of violating Section 3126(a)(1) [indecent assault] of the Pennsylvania Criminal Code. *Commonwealth of Pennsylvania v. Rodgers,* Docket No. 2300-93 (Court of Common Pleas, Chester County, Pa.). The record in that case indicates that Mr. Rodgers attracted his victims through a common interest in amateur radio and that each victim was assaulted while spending a night at Mr. Rodgers' home to use his amateur radio apparatus. On November 9, 1994, the Court sentenced Mr. Rodgers to consecutive terms of imprisonment of three to six months for each count. Additionally, the Court ordered Mr. Rodgers to pay fines totalling $200, costs, and restitution up to a total of $20,303 (to pay for therapy for his victims).

3. In view of the criminal conviction described above, there is a substantial and material question whether Mr. Rodgers possesses the requisite qualifications for a renewal of his amateur service license. Certainly, his conviction for corrupting and indecently assaulting minors attracted through amateur radio is relevant to evaluating the likelihood that he will comply with the Commission's Rules as a licensee in the amateur service. *See Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, 1183 (1986), *recon.,* 1 FCC Rcd 421,424 (1986), *appeal dismissed sub nom. Nation* al *Association for Better Broadcasting v. FCC,* No. 86-1179 (D.C. Cir. June 11, 1987), *as modified,* 5 FCC Rcd 3252, 3253 (1990) [to cover nonbroadcast licensees], *recon.,* 6 FCC Rcd 3448 (1991).

4. IT IS ORDERED, under Section 309(e) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 309(e), that the application of George E. Rodgers to renew his amateur station and operator licenses IS DESIGNATED FOR HEARING before an Administrative Law Judge at a time and location to be determined by subsequent order; and that the issues thereupon will be the following:

(a) To determine whether, in light of the facts determined in *Commonwealth of Pennsylvania v. Rodgers, supra,* George E. Rodgers is qualified to renew his amateur service licenses.

(b) To determine, in light of the foregoing issue, whether granting George E. Rodgers's application would serve the public interest, convenience and necessity.

5. IT IS FURTHER ORDERED that, under Section 309(e) of the Act, 47 USC § 309(e), the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant as to all issues.

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to the applicant by Certified Mail – Return Receipt Requested – and that, to avail himself of the right to an administrative hearing the applicant must file a notice of appearance, under Section 1.221 of the Commission's Rules, 47 C.F.R. § 1.221, with the Commission's Secretary no later than 20 days after the release of this order.[1]

FEDERAL COMMUNICATIONS COMMISSION

Howard Davenport
Chief, Enforcement Division
Wireless Telecommunications Bureau

[1] The enclosed form may be used for this purpose.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

Chronicle Publishing Company
d/b/a Chronicle Cablevision of Hawaii,
Complainant, PA 95-001

Jones Spacelink of Hawaii, Inc.,
Complainant, PA 95-002

Chronicle Publishing Company
d/b/a Chronicle Cablevision of Hawaii,
Complainant, PA 95-003

American Cable TV Investors 4, LTD.
d/b/a Sun Cable Vision of Hawaii,
Complainant, PA 95-004

Time Warner Cable
d/b/a Oceanic Cable
Complainant, PA 95-005

Daniels Communications Partners L.P.
d/b/a Hawaiian Cablevision Company and
Kauai CableVision L.P. d/b/a Kauai CableVision,
Complainants PA 95-009

v.

GTE Hawaiian Telephone Company,
Incorporated,
Respondent

ORDER

Adopted: April 6, 1995; Released: April 12, 1995

By the Chief, Accounting and Audits Division:

1. On April 5, 1994, Chronicle Publishing Company d/b/a Chronicle Cablevision of Hawaii; Jones Spacelink of Hawaii, Inc.; American Cable TV Investors 4, LTD. d/b/a Sun Cable Vision of Hawaii; Time Warner Cable d/b/a Oceanic Cable; Daniels Communications Partners L.P. d/b/a Hawaiian CableVision Company; and Kauai CableVision L.P. d/b/a Kauai CableVision ("Complainants") filed motions to dismiss with prejudice their pole attachment complaints against GTE Hawaiian Telephone Company, Incorporated ("GTE Hawaiian") and terminate the above-captioned proceedings. The Complainants state that to avoid the expense and uncertainty of litigation, the Complainants and GTE Hawaiian have decided to compromise and settle the claims at issue in those proceedings. The Complainants further state that dismissal of these complaints will affect no other parties and will serve the public interest by eliminating the need for unnecessary litigation and the concomitant expenditure of time and resources by the Commission and the parties.

2. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91 and 0.291 that the Complainants' motions to dismiss ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Vision Cable of North Carolina, Inc. FCC Physical System ID No. 010777	CUID No. NC0405 (Mecklenburg County, NC) NC0505 (Pineville, NC) NC0691 (Matthews, NC) NC0755 (Charlotte, NC) SC0372 (Lancaster County, SC)

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1995; Released: February 22, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Vision Cable of North Carolina, Inc. ("Vision Cable") was charging for its Cable Programming Service ("CPS") Tiers for CUID Nos. NC0405, NC0505, NC0691, NC0755, and SC0372. Vision Cable has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Vision Cable's prices only through May 14, 1994. As discussed below and based on the entire record before the Commission in this proceeding, we conclude that the CPS prices in effect for the period under review are not justified under the benchmark showing. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints for the franchise areas addressed in this Order were completed and served on Vision Cable and received by the Commission on the dates set forth in Appendix A.

5. Vision Cable submitted its initial CPS price justification through an FCC Form 393 filed on November 15, 1993 in response to the earliest valid complaint filed with the Commission for Charlotte, NC (CUID No. NC0755). Vision Cable submitted identical benchmark justifications in response to complaints for each of the other franchise areas included in this Order on January 27, 1994. Vision Cable supplemented its filings on June 21, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally[11] by submitting a system-wide filing that included each franchise area in which a complaint was pending. The record indicates that the CUIDs addressed here constitute four separate franchise areas but are served through a single cable system, that Vision Cable charges the same prices for all rate-regulated cable services and associated equipment in each of these franchise areas, and that Vision Cable offers the same channel line-ups in all four areas. Because there are no significant distinctions among Vision Cable's services and rates in these four areas, we will permit these

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Vision Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-36, 9 FCC Rcd 4119 (1994) (*"Second Order of Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Vision Cable implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Vision Cable's prices for the period after May 14, 1994 may be required to reflect the fact that Vision Cable's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[11] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

rates to be justified through a single Form 393 filing. Vision Cable supplemented its Form 393 filings on December 21, 1994, in response to the Commission's letter and telephone call which requested further clarification of its amended showing,[12] and on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[13] In response to the Public Notice, Vision Cable submitted a revised Part II form 393 for the franchise areas in which a complaint are pending.

III. DISCUSSION

6. In the June 21, 1994 benchmark filing, Vision Cable asserts that its monthly price of $13.31 per subscriber for the Cable Services Tier is justified by its benchmark filing because its price is equal to the maximum permitted charge of $13.31 as calculated in the filing. Vision Cable's amendment to the benchmark filing on February 7, 1995 asserts that is revised monthly price of $11.52 per subscriber for the Cable Service Tier is justified because its price is equal to the maximum permitted charge. Vision Cable did not attempt to justify its monthly prices of $1.27 per subscriber for the SuperStation Package and $3.50 per subscriber for the Preferred Service Package in the benchmark filing on June 21, 1994. However, upon review of the entire record, we have determined that Vision Cable has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Vision Cable's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Vision Cable did not correctly gross-up its tax entries. By placing entries in these columns, Vision Cable confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Vision Cable incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).[14] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly adjusted tax entries.

b. In Vision Cable's benchmark filing made in response to the initial date of regulation, its calculations on Form 393, Part I, and Form 393, Part II, Worksheet 1, Vision Cable did not count as rate-regulated or as satellite channels eight channels that it offered as part of two *a la carte* packages of channels available either as packages or individually. Both of these packages, known as the SuperStation Package and the Preferred Service Package, were created by Vision Cable on September 1, 1993. Prior to September 1, 1993, three of the channels in the SuperStation Package (WTBS, WOR, and WGN) were offered as part of the basic tier and one channel (TNT) was part of the Cable Service tier; the four channels in the Preferred Service Package (Sport South, Sci-Fi, Comedy Central, and Country Music TV) were previously offered as a separate cable service tier. Pursuant to the Memorandum Opinion and Order adopted by the Commission on December 19, 1994 and released December 22, 1994, the SuperStation Package and the Preferred Service Package should have been treated as rate-regulated service tiers.[15] Vision Cable's maximum permitted prices are therefore determined by including the 8 channels of the SuperStation and Preferred Service Packages as additional CPS tiers, increasing the total rate-regulated channels from 39 to 47 and the total satellite channels from 26 to 34. Vision Cable's Public Notice response filed on February 7, 1995, include the *a la carte* channels of the SuperStation and Preferred Service Packages as rate regulated channels on the Cable Programming Service Tier.

c. Vision Cable's Form 393, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Vision Cable should have entered on line 104 the monthly equipment revenue figure it entered on Line 34 of Step G of Part III.[16] Accordingly, we have recalculated Worksheet 1 using the correct entry.

7. Because of these errors, we conclude that Vision Cable has failed to demonstrate that its prices for the CPS tiers, upon the initial date of regulation, were not unreasonable. We will therefore set prices for these tiers incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its amended Form 393, Vision Cable calculated the Inflation Adjustment Factor using data it relied on when it sets its CPS prices. If based on this data

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[12] Letter from Gwendolyn G. Flowers, FCC, to Joel Reichard, Controller, Vision Cable of North Carolina, Inc. (Dec. 19, 1994); Letter from Joel Reichard to Gwendolyn G. Flowers, FCC (Dec. 21, 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

[14] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation"). *See also Cable Television Rate Regulation Questions and Answers Relating To FCC Form 393*, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment").

[15] *Vision Cable of North Carolina, Inc., Charlotte, North Carolina*, LOI 93-24, DA 94-1552 (Cab. Serv. Bur. released December 22, 1994).

[16] *See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements*, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

Form 393 indicated that Vision Cable's prices were reasonable, then Vision Cable would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[17] However, Vision Cable has not shown that its prices were reasonable, so we must recalculate the Inflation Adjustment factor on the basis of the most accurate data currently available for the date that Vision Cable should have filed Form 393 in each franchise area.[18] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992, 125.7 for the third quarter of 1993, and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.028 through September 1993 for CUID Nos. NC0755 and NC0405 and 1.034 through December 1993 for CUID Nos. NC0505, NC0691, and SC0372.

8. These adjustments have the cumulative effect of reducing the maximum permitted monthly prices for the cable service tier from $13.31 (as Vision Cable calculated in the benchmark filing on June 21, 1994) and revising the maximum permitted monthly prices for the cable service tier of $11.52 (recalculated by Vision Cable in their amended benchmark filing on February 7, 1995) to the amounts set forth in Appendix B. These adjustments further result in the maximum permitted prices set forth in Appendix B for the SuperStation Package and the Preferred Service Package.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Vision Cable's showing supports the maximum reasonable CPS tier prices set forth in Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[19] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. We further conclude that Vision Cable must reflect in its FCC Form 1200 rate filings for the period after May 14, 1994 the fact that Vision Cable's prices during the earlier period were unreasonable.[20] We reserve the right to make further adjustments to Vision Cable's prices for the period after May 14, 1994, upon completion of our review of Vision Cable's FCC Form 1200 rate filings.

11. We further conclude that Vision Cable has submitted in good faith a timely optional supplemental filing in response to our December 29, 1994 Public Notice.[21] As provided in the Public Notice, we will therefore relieve Vision Cable of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Vision Cable of North Carolina, Inc. in Mecklenburg County, North Carolina, CUID No. NC0405; Pineville, North Carolina, CUID No. NC0505; Matthews, North Carolina, CUID No. NC0691; Charlotte, North Carolina, CUID No. NC0755; and Lancaster County, South Carolina, CUID No. SC0372, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the benchmark filings submitted by Vision Cable of North Carolina, Inc. with respect to Mecklenburg County, North Carolina, CUID No. NC0405; Pineville, North Carolina, CUID No. NC0505; Matthews, North Carolina, CUID No. NC0691; Charlotte, North Carolina, CUID No. NC0755; and Lancaster County, South Carolina, CUID No. SC0372, for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justify the maximum prices in each franchise area set forth in Appendix B (plus franchise fee) for Vision Cable of North Carolina, Inc.'s Cable Programming Service Tiers.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Vision Cable of North Carolina, Inc. shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[22] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month and were thus unreasonable, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED that Vision Cable of North Carolina, Inc. shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees

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[17] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

[18] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page II, requires that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." In general, a cable operator must submit a justification for its rates no more than 30 days after service of the earliest valid complaint. 47 C.F.R. § 76.956(a). The Inflation Adjustment Factor therefore must be calculated as if Vision Cable had filed Form 393 within this 30-day period.

[19] This finding is based solely on the representations of Vision Cable listed in paragraph 5, *supra* and the modifications described in paragraphs 6 and 7, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[20] We reviewed Vision Cable's FCC Form 1200 rate filings and confirmed that Vision calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

[21] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

[22] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Vision Cable of North Carolina, Inc. shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Mecklenburg County, North Carolina, CUID No. NC0405; Pineville, North Carolina, CUID No. NC0505; Matthews, North Carolina, CUID No. NC0691; Charlotte, North Carolina, CUID No. NC0755; and Lancaster County, South Carolina, CUID No. SC0372, for the period beginning May 15, 1994, to include the SuperStation Package and the Preferred service Package as Cable Programming Service tiers and to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum prices in each franchise area set forth in Appendix B (plus franchise fee).

17. IT IS FURTHER ORDERED that Vision Cable of North Carolina, Inc. shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

18. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Vision Cable of North Carolina, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
NC0405	09/20/93	09/15/93
NC0505	01/06/94	12/28/93
NC0691	12/29/93	12/24/93
NC0755	09/20/93	09/10/93
SC0372	01/03/94	12/28/93

Appendix B

Maximum Permitted Rates

CUID No.	Cable Service	SuperStation	Preferred Service
NC0405	$11.50	$1.77	$1.77
NC0505	$11.57	$1.78	$1.78
NC0691	$11.57	$1.78	$1.78
NC0755	$11.50	$1.77	$1.77
SC0372	$11.57	$1.78	$1.78

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-106

In the Matter of

Petition of the Connecticut
Department of Public Utility
Control to Retain Its Rate
Regulatory Control of the Rates
of Wholesale Cellular Service
Providers in the State of Connecticut

ORDER

Adopted: February 23, 1995; Released: February 24, 1995

By the Chief, Wireless Telecommunications Bureau:

1. On February 9, 1995, the Wireless Telecommunications Bureau ("the Bureau") adopted and released the *Second Confidentiality Order* in this proceeding, which determined, *inter alia*, the confidential treatment that would be accorded to documents submitted January 20, 1995 by the State of Connecticut Department of Public Utility Control ("DPUC filing").[1] In that Order, we decided to publicly disclose those parts of the DPUC filing that were not subject to a request for confidential treatment.[2] We also decided to make limited disclosure, under the terms of the protective order adopted for Connecticut in Appendix B of the *First Confidentiality Order*,[3] of those parts of the DPUC filing that were accorded confidential treatment in the Connecticut cellular investigation. We decided that those parts of the filing that we listed in Section 3 of Appendix A to the *Second Confidentiality Order*, however, would not be considered by the Commission because the DPUC filing did not identify which of these materials were allegedly deserving of confidential treatment, nor describe reasons for their confidential treatment.[4]

2. On February 16, 1995, the Bell Atlantic Metro Mobile Companies ("BAMM") and the Connecticut Cellular Resellers Coalition ("Resellers") filed applications for review of the *Second Confidentiality Order*, contending, *inter alia*, that the Bureau should not have deleted from the record of this proceeding certain documents submitted in support of the DPUC petition.[5] The parties appear to take conflicting views as to the impact of our action. Each one implies that it is harmed by our action, to the benefit of the other.[6] Moreover, BAMM argues that the Bureau should not have included any portion of the DPUC filing in the record of this proceeding, and our decisions as to which materials to include or exclude were arbitrary and capricious.[7] BAMM contends that materials were, in fact, rejected where they "cannot be found to advance the DPUC's arguments."[8] The Resellers argue that the Bureau should have included in the record of this proceeding all of the documents listed in Section 3 of Appendix A to the *Second Confidentiality Order*, and that such materials should be considered by the Commission and disclosed to parties subject to the terms of the Protective Order adopted for other Connecticut materials.[9] They assert that excluding only selected materials from the record of this proceeding, particularly the Resellers' Brief in DPUC Docket No. 94-03-27, would adversely affect the Commission's ability to consider the entire record as it addresses the merits of the DPUC Petition to retain regulatory authority.[10]

3. The Commission will act on these applications for review at some later time, pursuant to its rules.[11] On our own motion and authority, however, we reconsider *sua sponte* our decision to exclude from the record certain of the Connecticut materials,[12] and we will instead enter them in the record and make limited disclosure of the materials only to outside counsel and outside experts for parties to this proceeding, pursuant to the protective order which we adopted for purposes of this proceeding in the *First Confidentiality Order*.[13] We take this action to expedite this proceeding, which is subject to a statutory deadline set forth in Section 332(c)(3)(B) of the Communications Act, 47 U.S.C. § 332(c)(3)(B). As the materials will be made available only to outside counsel and outside experts for parties, pursuant to the terms of a protective order, no party will be harmed by our action.

4. This Order is effective March 3, 1995, with respect to materials submitted by the DPUC on January 20, 1995, and determined herein, *supra* para. 3, to warrant disclosure subject to protective order. This action provides an opportunity to seek review of our decision herein respecting the treatment of these materials.

5. The *Second Confidentiality Order* established a pleading cycle for comment on the DPUC filing materials discussed therein, with comments due no later than February 24, 1995, and replies due no later than March 3, 1995.[14] We hereby defer that pleading cycle for two weeks.

6. Accordingly, IT IS ORDERED that the *Second Confidentiality Order, supra* n.1, is reconsidered on our own motion to the extent discussed herein.

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[1] *See* Order, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, DA 95-208, released Feb. 9, 1995 (*Second Confidentiality Order*).
[2] *See Second Confidentiality Order*, para. 16.
[3] *See* Order, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, DA 95-111, released Jan.25, 1995 (*First Confidentiality Order*).
[4] *See Second Confidentiality Order*, paras. 14-16.
[5] *See* BAMM, Application for Review, PR Docket No. 94-106, filed Feb. 16, 1995, at 6-7 ("BAMM Petition"); Resellers, Application for Review, PR Docket No. 94-106, filed Feb. 16, 1995, at 1-2, 6-7 ("Resellers' Petition").
[6] *See id.*
[7] *See* BAMM Petition, at 7.
[8] *Id.*
[9] *See* Resellers' Petition, at 1-2.
[10] *Id.* at 6-7.
[11] *See* Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115.
[12] *See* 47 C.F.R. § 1.113(a).
[13] That protective Order is appended to the *First Confidentiality Order* as Appendix B.
[14] *See Second Confidentiality Order*, para. 42.

7. IT IS FURTHER ORDERED that the materials listed in Section 3 of Appendix A of the *Second Confidentiality Order* SHALL BE DISCLOSED beginning March 6, 1995, to outside counsel and outside experts for parties, provided that such counsel and/or experts have filed in this docket an executed copy of the protective order attached as Appendix B of the *First Confidentiality Order* with the Commission's Secretary.

8. IT IS FURTHER ORDERED that this Order is effective March 3, 1995, with respect to materials submitted by the DPUC on January 20, 1995, and determined herein, *supra* para. 3, to warrant disclosure subject to protective order.

9. IT IS FURTHER ORDERED that the schedule for comments and replies on the materials submitted January 20, 1995 by the State of Connecticut, established in the *Second Confidentiality Order*, IS EXTENDED BY TWO WEEKS in accordance with paragraph 5 of this Order. Any Comments on such materials, including those affected by this order, are due no later than March 10, 1995, and any replies are due no later than March 17, 1995.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable	CUID Nos. WA0024, WA0041,
Puget North/Central,	WA0049, WA0110, WA0112,
Washington	WA0118, WA0150, WA0180,
Puget South,	WA0181, WA0227, WA0262,
Washington	WA0308, WA0403, WA0405,
Dayton, Ohio	WA0406, WA0413, OH0453,
Systems	OH0520, OH0961

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Viacom Cable was charging for its cable programming service ("CPS") tier in the communities designated by the CUID numbers referenced above on its Puget North/Central and Puget South, Washington and Dayton, Ohio, Systems. Viacom has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Viacom's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas which are the subject of this Order were completed and served on Viacom and received by the Commission on the dates set forth on Appendix A.[11]

5. Viacom filed its first FCC Form 393 for each of the franchise areas addressed in this Order prior to June 27, 1994. On June 27, 1994, Viacom filed amended FCC Forms 393 for all areas in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[12] Viacom subsequently filed further amended Forms 393 on August 15, 1994 for King County-Vashon Island, Washington, CUID No. WA0150;

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Viacom has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices for the period ending May 14, 1994 are found to be excessive, reductions in Viacom's prices for the period after May 14, 1994 may be required to reflect the fact that Viacom's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] Id.

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] On January 1, 1994, the Mad River Township, Ohio franchise area, CUID No. OH0520, merged into the Village of Riverside, Ohio, CUID No. OH0961. Prior to this date, a complaint had been filed against the CPS price charged in CUID No. OH0520 but not in CUID No. OH0961. Our jurisdiction over the rate charged in the portion of CUID No. OH0961 that was not previously part of CUID No. OH0520 therefore dates from January 1, 1994. *See* 47 C.F.R. § 984(a) (prices must be uniform throughout a franchise area).

[12] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994). On June 27, 1994, Viacom requested the deletion of CUID No. OH0520 in view of the merger of CUID No. OH0520 with CUID No. OH0961, and filed a Form 393 for CUID No. OH0961 which included consolidated information for the merged franchise area. Because Viacom could have made a consolidated system filing originally, *see* Form 393 Instructions, page 10, note 1, we will accept the June

on September 12, 1994 for the City of Mercer Island, Washington, CUID No. WA0110; and on October 31, 1994 for King County-Comm Telecable, Washington, CUID No. WA0118, and King County-Vista, Washington, CUID No. WA0150. Finally, Viacom submitted additional information for all areas on February 8, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[13]

III. DISCUSSION

6. Viacom asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are lower than or equal to the maximum permitted charges as calculated in the filings prior to February 8, 1995. Upon review of Viacom's Form 393 filings, we have found that Viacom has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Viacom's calculations in Form 393:

a. In its February 8, 1995 optional filings, Viacom set forth the total number of regulated channels and the total number of satellite channels based on the standards set forth in the *Public Notice*. Under those standards, a channel must be counted as a regulated channel if, but only if, more than 50% of the time the channel was in operation it was used to provide a service subject to rate regulation.[14] Similarly, in order to count as a satellite channel, a channel must be used for regulated satellite programming more than 50% of the time it is in operation.[15] We have adjusted Viacom's FCC Form 393 filings to reflect the counts of total regulated and satellite channels reported on Viacom's optional filings, which are not inconsistent with the record as a whole.

b. In its amended filings of June 27, 1994, Viacom states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its CPS prices. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its prices), and if based on this data Form 393 indicated that its prices were reasonable, then Viacom would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[16] However, the figures Viacom used are not consistent with data on which it should have relied in setting its CPS prices. Specifically, Viacom used data released by the U.S. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used earlier data to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed Adjustment Time Periods extending through various periods in the last quarter of 1993 and the first quarter of 1994 (depending on the filing date of the complaint), which is inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculation of the Inflation Adjustment Factor is thus incorrect.

c. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the latest date contemplated by the Form 393 instructions.[17] On its February 8, 1995 filings in response to the *Public Notice*, Viacom supplied corrected Inflation Adjustment Factors based on the last legal filing date as defined in the *Public Notice*.[18] We have used these Inflation Adjustment Factors to calculate Viacom's maximum permitted rates.

7. Correction of Viacom's errors does not result in a reduction in Viacom's maximum permitted CPS tier prices in CUID Nos. WA0024, WA0041, WA0112, WA0180, WA0181, WA0227, WA0262, WA0308, WA0403, WA0405, WA0406, WA0413, OH0453, OH0520 and OH0961. We therefore conclude that Viacom has demonstrated that its prices for the CPS tier in these areas were not unreasonable.

8. We conclude that Viacom has failed to demonstrate that its prices for the CPS tier were not unreasonable in CUID Nos. WA0110, WA0118, and WA0150. We will therefore set prices for this tier in these communities, incorporating the adjustments discussed above. These adjustments have the effect of reducing the maximum permitted monthly CPS tier price for each franchise area to the levels set forth in Appendix B.

IV. CONCLUSIONS

9. Upon review of the record herein, we conclude that Viacom's showing supports the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14,

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27, 1994 filing for CUID No. OH0961 as governing Viacom's permitted rate in CUID No. OH0520 throughout the period under review.

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994) (*"Public Notice"*); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan.20, 1995).

[14] *See Public Notice* at 2; *Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, at para. 6a-6c (Cab. Serv. Bur., released Nov. 9, 1994).

[15] *Id.*

[16] *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration"*).

[17] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis). The instructions to FCC Form 393, page 11, require that the Inflation Adjustment Factor be calculated using "the number of whole months from September 30, 1992 to the date you will submit this form." In general, a cable operator must submit a justification for its rates no more than 30 days after service of the earliest valid complaint. 47 C.F.R. § 76.956(a). The Inflation Adjustment Factor therefore must be calculated as if Viacom Cable had filed Form 393 within this 30-day period.

[18] *See Public Notice* at 3-4.

1994.[19] However, we further determine with respect to CUID Nos. WA0110, WA0118, and WA0150 that the refunds at issue are such de minimis amounts that it would not serve the public interest to order a refund.

10. We further conclude that Viacom must reflect in its FCC Form 1200 rate filings for CUID Nos. WA0110, WA0118, and WA0150 for the period after May 14, 1994 the fact that Viacom's prices during the earlier period were unreasonable.[20] We reserve the right to make further adjustments to Viacom's prices for the period after May 14, 1994, upon completion of our review of Viacom's FCC Form 1200 rates.

11. We further conclude that Viacom has submitted in good faith optional supplemental filings in response to our *Public Notice*. As provided in the *Public Notice*, we will relieve Viacom of its obligation to obtain advance Commission approval of adjustments to its CPS prices for one year following the release of this Order.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Viacom Cable in the Town of Goldbar, Washington, CUID No. WA0024; the City of Fircrest, Washington, CUID No. WA0041; the City of Puyallup, Washington, CUID No. WA0049; the City of Seattle, Washington, CUID No. WA0112; Pierce County, Washington, CUID No. WA0180; King County-Lee Hills, Washington, CUID No. WA0181; the City of Gig Harbor, Washington, CUID No. WA0227; the City of Tacoma, Washington, CUID No. WA0262; the City of Bonney Lake, Washington, CUID No. WA0308; the City of Dupont, Washington, CUID No. WA0403; the City of Yelm, Washington, CUID No. WA0405; the City of Roy, Washington, CUID No. WA0406; King County-Vashon Island, Washington, CUID No. WA0413; the City of Dayton, Ohio, CUID No. OH0453; Mad River Township, Ohio, CUID No. OH0520; and the Village of Riverside, Ohio, CUID No. OH0961, and all other complaints in these franchise areas relating to the same prices, ARE DENIED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the complaints referred to in Appendix A against the cable programming service prices charged by Viacom Cable in the City of Mercer Island, Washington, CUID No. WA0110; King County-Comm Telecable, Washington, CUID No. WA0118; and King County-Vista, Washington, CUID No. WA0150, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

14. IT IS FURTHER ORDERED that the benchmark filings submitted by Viacom Cable justify the maximum reasonable price in each franchise area set forth in Appendix B (plus franchise fee) for Viacom Cable's cable programming service tier.

15. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Viacom Cable shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to Mercer Island, Washington, CUID No. WA0110; King County-Comm Telecable, CUID No. WA0118; and King County-Vista, CUID No. WA0150 for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).

16. IT IS FURTHER ORDERED that Viacom Cable shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

17. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Viacom Cable shall not be required to obtain advance approval of adjustments to its CPS prices in the franchise areas addressed herein for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
WA0024	11/18/93	10/29/93
WA0041	11/4/93	10/31/93
WA0049	1/6/94	11/5/93
WA0110	12/3/93	11/30/93
WA0112	1/7/94	1/3/93
WA0118	9/20/93	9/3/93
WA0150	9/20/93	9/3/93
WA0180	1/7/94	10/30/93
WA0181	9/20/93	9/3/93
WA0227	11/8/93	11/5/93
WA0262	11/12/93	11/9/93
WA0308	1/7/94	11/3/93
WA0403	11/15/93	11/10/93
WA0405	1/7/94	11/6/93
WA0406	11/12/93	11/9/93
WA0413	9/20/93	9/3/93
OH0453	2/25/94	2/22/94
OH0520	11/19/93	11/9/93
OH0961	1/1/94	

[19] This finding is based solely on the representations of Viacom listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[20] We reviewed Viacom's FCC Form 1200 rate filings and confirmed that Viacom calculated its rates for the period after May 14, 1994 using the rates that we find in this Order to be unreasonable.

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
WA0024	$11.13	$11.13
WA0041	$12.29	$12.29
WA0049	$12.29	$12.29
WA0110	$11.13	$11.09
WA0112	$11.13	$11.13
WA0118	$10.57	$10.54
WA0150	$10.57	$10.52
WA0180	$12.29	$12.29
WA0181	$12.29	$12.29
WA0227	$12.29	$12.29
WA0262	$12.29	$12.29
WA0308	$12.29	$12.29
WA0403	$12.29	$12.29
WA0405	$12.29	$12.29
WA0406	$12.29	$12.29
WA0413	$12.29	$12.29
OH0453	$10.10	$10.10
OH0520	$10.31	$10.31
OH0961	$10.31	$10.31

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Georgia Cable Partners GA0078 DeKalb County

Withdrawal of FCC Form 329
Rate Complaint

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

1. On October 17, 1993, a single rate complaint was filed alleging that the prices charged by George Cable Partners (GCP) in DeKalb County, Georgia for cable programming service tier (CPS) services were unreasonably high. On July 5, 1994, the complainant withdrew this complaint, stating that he had moved out of the area and had no interest in prosecuting the complaint. This complainant was the only complainant who filed with this Commission in this community. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. We will allow the withdrawal of this complaint, and our review of these filings will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[1] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[2] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[3] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[4] The Commission subsequently revised its rate regulations effective May 15, 1994.[5] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[6] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393, as GCP did here.

4. Under our rules, this Commission's authority to regulate CPS cable rates arises when a valid complaint against those rates is filed. The sole complaint against this GCP in this community has been withdrawn. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[7] Because our review of the rate justification showing is predicated on the existence of a rate complaint, and because GCP no longer faces a rate complaint, we are terminating our review of GCP's filing for this community.

5. Accordingly, IT IS ORDERED that permission to withdraw the FCC Form 329 rate complaint against the cable programming service rates of Georgia Cable Partners in DeKalb County, Georgia, GA0078, IS GRANTED, and the review of the resulting rate justification filings IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).

[2] 47 C.F.R. § 76.956.

[3] 47 C.F.R. § 76.956(b).

[4] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[5] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*Second Order on Reconsideration);* 47 C.F.R. § 76.922(b).

[6] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[7] Conference Report on the Cable Act of 1992, at 62. *See also*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) *(Rate Order)* at 5669.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom Cable	CUID Nos. CA0110, CA0111,
Sonoma, California, System	CA0112, CA1513

Benchmark Filings to Support
Cable Programming Service Prices

ORDER ON RECONSIDERATION

Adopted: February 24, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

1. We here reconsider on our own motion our decision in *Viacom Cable, Sonoma, California*, CUID Nos. CA0110, CA0111, CA0112, and CA1513, DA 95-273 (Cab. Serv. Bur., released Feb. 21, 1995), pursuant to Section 1.108 of the Commission's Rules, 47 C.F.R. § 1.108. Specifically, we reconsider the determination of the maximum reasonable rate for Healdsburg, California, CUID No. CA0111, and the determination that the refund for CUID No. CA0111 is such a de minimis amount that it would not serve the public interest to order a refund.[1]

2. Due to a mathematical error in processing Viacom Cable's FCC Form 393 for CUID No. CA0111, the maximum reasonable rate was incorrectly stated on Appendix B to be $11.05. The correct maximum reasonable rate is $10.86. Since the actual rate for CUID No. CA0111 was $11.08, the required refund is $.22 per subscriber per month.

3. We conclude that the required refund is not such a de minimis amount that it would not serve the public interest to order a refund. We will therefore order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

4. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint filed on November 15, 1993 against the cable programming service price charged by Viacom Cable in Healdsburg, California, CUID No. CA0111, and all other complaints in this franchise area related to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

5. IT IS FURTHER ORDERED that the benchmark filing submitted by Viacom Cable with respect to Healdsburg, California, CUID No. CA0111, for the period from November 15, 1993 to May 14, 1994, justifies a maximum reasonable price of $10.86 (plus franchise fee) for Viacom Cable's cable programming service tier.

6. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Viacom Cable shall refund to subscribers in Healdsburg, California, CUID No. CA0111, that portion of the amounts paid for cable programming service from November 15, 1993[2] to May 14, 1994 which exceeded $10.86 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

7. IT IS FURTHER ORDERED that Viacom Cable shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

8. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Viacom Cable shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Healdsburg, California, CUID No. CA0111, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal $10.86 (plus franchise fee).

9. IT IS FURTHER ORDERED that Viacom Cable shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

10. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's rules, 47 C.F.R. § 76.960, that Viacom Cable shall not be required to obtain advance Commission approval of adjustment to its CPS price for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] *Id.* at para. 8 and Appendix B.
[2] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Video Cablevision, Inc.
Oakham and Pepperell, Massachusetts — CUID Nos. MA0281, MA0344

Benchmark Filings To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 1995; Released: February 24, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices United Video Cablevision, Inc. ("United Video") was charging for its cable programming service ("CPS") tier in Pepperell, Massachusetts, CUID No. MA0281 and in Oakham, Massachusetts, CUID No. MA0344. United Video has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of United Video's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in Oakham, Massachusetts, CUID No. MA0344, was completed and served on United Video and received by the Commission on February 2, 1994. The first complete and timely CPS complaint in Pepperell, Massachusetts, CUID No. MA0281, was completed and served on United Video on November 16, 1993 and received by the Commission on November 22, 1993.

5. United Video filed its first FCC Form 393 on March 1, 1994 for CUID No. MA0334 and on June 6, 1994 for CUID No. MA0281. United Video submitted additional information for both areas on February 7, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[11]

6. As part of its June 6, 1994 filing for CUID No. MA0281, United Video moved to dismiss the November 16, 1993 complaint. United Video argues that the complaint should be dismissed for a variety of reasons. These include that the complainant did not list the franchising authority's name and address, checked the wrong box in response to question 6 of FCC Form 329 (indicating that the complaint related to a rate change after September 1, 1993 rather than a rate in effect on September 1, 1993), included both the basic and CPS rates and programming in response to questions 8 and 9 of Form 329, and stated an allegedly incorrect signature date.[12] United Video's assertions do not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be grant-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent United Video has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration)*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which United Video implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994) (*"Public Notice"*); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan.20, 1995).

[12] Motion to Dismiss and Response of United Video Cablevision, Inc. to a Complaint Concerning Rates for Cable Programming Services Provided in Pepperell, Massachusetts (filed June 6, 1994).

ed and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the complainant's response to question number 9 includes channels contained on the CPS tier and because the rates listed in answer number 8 and on the attached bill indicate that the complainant received the CPS tier, we find it reasonable to conclude that the complainant objected to the CPS tier rate in effect on September 1, 1993, and that he believed that rate was unreasonable. We therefore find the complaint dated November 16, 1993 valid and deny United Video's motion to dismiss the complaint.

III. DISCUSSION

7. United Video asserts that its monthly CPS tier price of $11.55 per subscriber in CUID No. MA0281 and its monthly CPS tier price of $11.35 per subscriber in CUID No. MA0344 are justified by its benchmark filings because its prices are below the maximum permitted charges as calculated in the filings. Upon review of United Video's Forms 393, we have found no apparent errors that would require a recalculation of United Video's maximum permitted CPS prices.

IV. CONCLUSIONS

8. Upon review of the record herein, we conclude that United Video has demonstrated that $11.55 (plus franchise fee) for CUID No. MA0281 and $11.35 (plus franchise fee) for CUID No. MA0344 were reasonable CPS tier prices for the period from the filing of the earliest complaint in each franchise area to May 14, 1994.[13]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the Motion of United Video Cablevision, Inc. to dismiss the November 16, 1993 complaint against its cable programming service price charged in Pepperell, Massachusetts, CUID No. MA0281, IS DENIED.

10. IT IS FURTHER ORDERED that the complaints referenced herein against the cable programming service prices charged by United Video Cablevision, Inc. in Pepperell, Massachusetts, CUID No. MA0281, and Oakham, Massachusetts, CUID No. MA0344, ARE DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filings submitted by United Video Cablevision, Inc. with respect to Pepperell, Massachusetts, CUID No. MA0281, and Oakham, Massachusetts, CUID No. MA0344, for the period from the filing of the earliest complaint in each franchise area to May 14, 1994, justify a price of $11.55 per month (plus franchise fee) in CUID No. MA0281 and $11.35 per month (plus franchise fee) in CUID No. MA0344 for United Video Cablevision, Inc.'s cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] These findings are based solely on the representations of United Video listed in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ML Media Partners, L.P.	CUID Nos. CA0305,
Trading as MultiVision Cable TV	CA0306, CA0317,
	CA0318, CA0319
	and CA0619

Filings To Support Cable
Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 1995; Released: March 8, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices ML Media Partners, L.P., Trading as MultiVision Cable TV ("MultiVision") was charging for its cable programming service ("CPS") tiers in numerous communities around California (the "subject communities"). *See* Appendix for a list of the subject communities and the number of basic and CPS channels MultiVision offered in each community both before and after September 1, 1993. Rather than attempting to justify its prices through a benchmark or cost of service showing, MultiVision responded to the complaints by stating that it has no CPS tier in those systems. On June 24, 1994 MultiVision filed FCC Form 393 for the subject communities.[1] On February 3, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings,[2] MultiVision submitted rate cards and channel line-ups in support of its claim that CPS tiers subject to rate regulation did not exist as of September 1, 1993 and still do not exist in any of the subject communities.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

II. BACKGROUND

4. The Cable Services Bureau has addressed the regulatory status of packages of channels offered on an a la carte basis in several orders resolving letters of inquiry ("LOIs") directed to cable operators.[12] Of particular relevance to this case, the Cable Services Bureau has released orders resolving LOIs regarding Century Cable TV's ("Century") systems in Huntington, West Virginia; Morgantown, West Virginia; Muncie, Indiana; Owensboro, Kentucky; Yuma, Arizona; Brunswick, Georgia; and San Juan, Puerto Rico.[13] Relying on the Commission's *Going Forward Order*,[14] the

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[1] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7762 (Cab. Serv. Bur. 1994).

[2] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan.20, 1995).

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*); 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[12] *See* , e.g. Multivision Cable TV, Prince Georges County, Maryland, LOI-93-15, DA 95-106 (Cab. Serv. Bur., released January 25, 1995).

[13] *See Century Cable TV, Huntington, West Virginia*, LOI-93-49, DA 94-1314, 9 FCC Rcd 7337 (Cab. Serv. Bur. 1994); *Century Cable TV, Morgantown, West Virginia*, LOI-93-34, DA 94-1358, 10 FCC Rcd 115 (Cab. Serv. Bur. 1994); *Century Cable TV, Muncie, Indiana*, LOI-93-18, DA 94-1354, 10 FCC Rcd 99 (Cab. Serv. Bur. 1994); *Century Cable TV, Owensboro, Kentucky*, LOI-93-45, DA 94-1361, 10 FCC Rcd 127 (Cab. Serv. Bur. 1994); *Century Cable TV, Yuma, Arizona*, LOI-93-39, DA 94-1360, 10 FCC Rcd 123 (Cab. Serv. Bur. 1994); *Century Cable TV, Brunswick, Georgia*, LOI-93-44, LOI-94-4, DA 94-1426 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, LOI-93-38, DA 94-1425 (Cab. Serv. Bur., released Dec. 12, 1994).

[14] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ 51 (adopted November 10, 1994).

Bureau's orders addressed the restructured service offerings implemented in these communities beginning September 1, 1993, in which Century eliminated its CPS tiers and offered instead only a basic service tier and a few a la carte channels. In each of these orders, the Bureau found that Century's restructured service offerings do not constitute a clear evasion of our rate rules. Specifically, the Bureau found that Century did not avoid rate regulation of most of its previous CPS channels because it moved those channels into a rate-regulated basic tier. With regard to the other channels, the orders permit Century to treat its a la carte packages as new product tiers that may be priced at market levels under the *Going Forward Order*.

5. Since the LOI orders found that the elimination of Century's PCPS tiers did not constitute a clear evasion of rate regulation and those channels not placed on the basic service tier could be treated as a new product tier, there were no CPS tiers in those communities, as of September 1, 1993, that were subject to rate regulation pursuant to Section 76.922 of our rules. Therefore, the Bureau subsequently dismissed all FCC Form 329 complaints filed against Century in each of those seven communities.[13]

III. DISCUSSION

6. The rate cards and channel line-up cards submitted by MultiVision for each of the subject communities indicate that MultiVision restructured its service offerings in the subject communities on September 1, 1993 in essentially the same way that Century did for the seven areas mentioned above where LOI orders have been issued. MultiVision discontinued its CPS offerings and placed all of its channels into a single basic service tier, except for five channels which it offered on an a la carte basis. Four of these channels (WTBS, TNT, The Nashville Channel and The Discovery Channel) were previously offered on Multivision's basic service tier; the fifth channel (The Sci-Fi Channel) was not available in these communities prior to September 1, 1993.[16]

7. We feel that we have sufficient information regarding MultiVision's restructured offerings in the subject communities to conclude, in accord with the *Going Forward Order*, that they should be treated the same way that we treated Century's restructured offerings in the seven communities where we issued LOI orders. As in these latter communities, although the instant restructuring resulted in the elimination of Century's CPS tiers, the small number of channels that were offered in the a la carte packages did not constitute an evasion of our then existing rules. Therefore, consistent with the action taken in the LOI orders, we will allow MultiVision to treat its a la carte packages in the subject communities as new product tiers even though they would not qualify as new product tiers under the *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a CPS tier. Thus, we need not rule on the FCC Form 329 complaints filed against MultiVision in the subject communities because there were no CPS tiers subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993. In addition, nothing in these complaints indicates that MultiVision's new product tiers violate any of the conditions for establishing those tiers outlined in the *Going Forward Order*.[17]

IV. CONCLUSION

8. Accordingly, IT IS ORDERED that the a la carte packages created by ML Media Partners, L.P.,Trading as MultiVision Cable TV in the communities listed in the attached Appendix may be treated as new product tiers under our *Going Forward Order*.

9. IT IS FURTHER ORDERED that all FCC Form 329 complaints pending against the CPS rates of ML Media Partners, L.P.,Trading as MultiVision Cable TV in each of the communities listed in the attached Appendix are DISMISSED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[13] *See Century Cable TV*, CUID Nos. IN0094, WV0156, WV0378, KY0120, AZ0019, DA 94-1422 (Cab. Serv. Bur., released Dec. 12, 1994); *Cable TV of Greater San Juan, San Juan, Puerto Rico*, CUID No. PR0001, DA 94-1530 (Cab. Serv. Bur., released Dec. 20, 1994); *Century Cable TV, Brunswick, Georgia*, CUID No. GA0040, DA 94-1531 (Cab. Serv. Bur., released Dec. 20, 1994).

[16] MultiVision also discontinued the Preview Guide Channel, which it had previously offered on the basic service tier.

[17] We have excused one violation, *i.e.*, migrating channels from rate-regulated tiers, in only those situations where, as here, the new product tier is established as an outgrowth of our change in our a la carte policy. *See Going Forward Order* at Para. 51.

APPENDIX

CUID	Community	8/31/93 *Pre-Regulation* Basic	Tiers	9/1/93 *Post Regulation* Basic	Tiers	A la Carte
CA0305	Calistoga	16	18	29	0	5
CA0306	Cotati	16	18	29	0	5
CA0317	Sonoma	16	18	29	0	5
CA0318	Rohnert Park	16	18	29	0	5
CA0319	St. Helena	16	18	29	0	5
CA0619	Sebastopol	16	18	29	0	5

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Houston Division of Time Warner Entertainment Company L.P., dba Warner Cable Communications Bellaire, Texas — CUID No. TX0302

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 1995; Released: March 8, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price The Houston Division of Time Warner Entertainment Company L.P., dba Warner Cable Communications ("Warner Cable") was charging for its cable programming service ("CPS") tier in Bellaire, Texas, CUID No. TX0302. Warner Cable has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Warner Cable's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint was served onP Warner Cable on December 16, 1993.[11] The Commission received the complaint on December 22, 1993.

5. Warner Cable attempted to justify its CPS price through an FCC Form 393 filed on January 18, 1994.

III. DISCUSSION

6. Warner Cable asserts that its monthly CPS tier price of $10.63 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $11.44 as calculated in the filing. Upon review of Warner Cable's Form 393, we have found no apparent errors that would result in Warner Cable's CPS tier price exceeding its maximum permitted price.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Warner Cable's showing supports a CPS tier price of $10.63 per month (plus franchise fee) for the period of December 22, 1993 to May 14, 1994.[12]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Warner Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Warner Cable implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.b

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was dated December 16, 1993 and states that it was mailed to Warner Cable on that date. Warner Cable has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider December 16, 1993 as the service date.

[12] This finding is based solely on the representations of Warner Cable listed in paragraph 5, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 22, 1993 complaint against the cable programming service price charged by The Houston Division of Time Warner Entertainment Company L.P., dba Warner Cable Communications in Bellaire, Texas, CUID No. TX0302, IS DENIED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the benchmark filing submitted by Warner Cable with respect to CUID No. TX0302, for the period of December 22, 1993 to May 14, 1994, justifies a price of $10.63 per month (plus franchise fee) for The Houston Division of Time Warner Entertainment Company L.P., dba Warner Cable Communication's cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Southwest Cable Television CUID No. CA0726
Bell Canyon, California

Benchmark Filing To Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 1995; Released: March 8, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the prices Century Southwest Cable Television ("Century") was charging for its cable programming service ("CPS") tiers in Bell Canyon, California, CUID No. CA0726. Century has chosen to attempt to justify its prices through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Century's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint was served on Century on October 22, 1993.[11] The Commission received the complaint on October 28, 1993.

5. Century states that it restructured its service offerings on September 1, 1993 and began offering twelve channels on an individual, or a la carte, basis. These a la carte channels could also be purchased collectively as one twelve-channel package (Century Select 12) or in two packages of six channels each (Century Select 6A and 6B). This same type of restructuring was addressed in our letter of inquiry ("LOI") order released on December 22, 1994, in which we resolved the regulatory status of a la carte packages offered by Century in Beverly Hills and Los Angeles, California.[12] In those two communities, Century also created three Century Select packages consisting of twelve or six a la carte channels. In the LOI order, we found that the retiering in Beverly Hills and Los Angeles constituted an evasion of rate regulation. We concluded that Century's a la carte packages must be treated as rate-regulated cable programming service tiers and that the channels composing them must be counted as rate-regulated channels as of September 1, 1993, for purposes of completing the rate justification forms. Based upon this decision, and in response to our December 29, 1994 Public Notice,[13] Century filed an FCC Form 393 for Bell Canyon for the first time on February 2, 1995, in which it treated the twelve-channel package of a la carte channels as a CPS tier.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Century has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Century implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was signed October 22, 1993 and states that it was mailed to Century on that date. Century has not complied with 47 C.F.R. § 76.956(a), which requires it Fto state when service occurred. Under these circumstances, we will consider October 22, 1993 as the service date.

[12] *Century Southwest Cable TV, Beverly Hills and Los Angeles, California*, LOI-93-17, DA 94-1553 (Cab. Serv. Bur., released Dec. 22, 1994).

[13] *Public Notice: Cable Services Bureau Announces Optional Procedures With Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan.20, 1995).

6. On February 23, 1995, Century amended its FCC Form 393 in response to a Commission letter which requested clarification of Century's showing.[14] On February 27, 1995, Century submitted documents explaining that Century had further restructured its service offerings on April 1, 1994. Specifically, Century removed the Arts and Entertainment ("A&E") channel and Video Hits 1 ("VH1") channel from the Century Select packages and replaced those channels with Court TV and ESPN2. A&E and VH1 were instead offered as a separate, two-channel CPS tier for $1.34 per month (plus franchise fee). This newly-created A&E/VH1 Satellite Tier was provided free of charge to subscribers who purchased seven or more Century Select channels.

7. On January 23, 1995, Century filed an Application for Review which argued that the Commission should reverse the Bureau's LOI decision regarding the treatment of its a la carte packages in Beverly Hills and Los Angeles. Century then filed a motion on January 26, 1995 requesting the Bureau to defer action on the complaints pending against its CPS rates in Beverly Hills and Los Angeles until the Commission rules on the Application for Review. On March 2, 1995, Century submitted a letter to the Bureau asking that its motion to defer action be extended to the complaint pending in Bell Canyon since the same a la carte issues on appeal for Beverly Hills and Los Angeles apply to Bell Canyon as well.

III. DISCUSSION

8. In its amended benchmark filing of February 23, 1995, Century calculated a maximum permitted rate for the Century Select 12 tier of $8.20 per month (plus franchise fee). Century did not, however, attempt to justify either its monthly price of $4.00 (plus franchise fee) for the Century Select 6A and 6B tiers or its monthly price of $1.34 (plus franchise fee) for the A&E/VH1 Satellite Tier. Upon review, we have found no apparent errors that would result in Century's price for the Century Select 12 tier exceeding the maximum permitted price. We further find that Century's prices for the Century Select 6A and 6B tiers and the A&E/VH1 Satellite Tier are less than or equal to the maximum permitted prices for these tiers.

9. In light of our conclusion that Century's actual prices for its CPS tiers did not exceed its maximum permitted prices, we find it unnecessary to address Century's request to defer action as applied to this case.

IV. CONCLUSIONS

10. Upon review of the record herein, we conclude that, for the period from October 28, 1993 to May 14, 1994, Century's showing supports as reasonable its CPS tier prices of $6.00 per month (plus franchise fee) for the Century Select 12 tier and $4.00 per month (plus franchise fee) for the Century Select 6A and 6B tiers. We further conclude that, for the period from April 1, 1994 to May 14, 1994, Century's showing supports as reasonable its price of $1.34 per month (plus franchise fee) for the A&E/VH1 Satellite Tier.[15]

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 22, 1993 complaint against the cable programming service prices charged by Century Southwest Cable Television in Bell Canyon, California, CUID No. CA0726, IS DENIED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED that the benchmark filing submitted by Century Southwest Cable Television, with respect to Bell Canyon, California, CUID No. CA0726, for the period October 28, 1993 to May 14, 1994, justifies its prices of $6.00 per month (plus franchise fee) for the Century Select 12 tier and $4.00 per month (plus franchise fee) for the Century Select 6A and 6B tiers.

13. IT IS FURTHER ORDERED that the benchmark filing submitted by Century Southwest Cable Television, with respect to Bell Canyon, California, CUID No. CA0726, for the period April 1, 1994 to May 14, 1994, justifies its price of $1.34 per month (plus franchise fee) for the A&E/VH1 Satellite Tier.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[14] Letter from Julia Buchanan, FCC, to Seth Davidson, counsel for Century (February 16, 1995).

[15] These findings are based solely on the representations of Century listed in paragraphs 5 and 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLEVISION OF BOSTON LIMITED	Acton, MA
PARTNERSHIP	Bedford, MA
A-R CABLE SERVICES, INC.	Boston, MA
CSC ACQUISITION - MA, INC.	Brookline, MA
	Braintree, MA
Appeals of Local Rate Orders of the	Fitchburg, MA
Massachusetts Community Antenna	Gardner, MA
Television Commission	Georgetown, MA
	Groveland, MA
	Haverhill, MA
	Hudson, MA
	Leominster, MA
	Lexington, MA
	Lunenburg, MA
	Lynnfield, MA
	Maynard, MA
	Norwood, MA
	Peabody, MA
	Stow, MA
	Sudbury, MA
	Templeton, MA
	Westminster, MA
	Westwood, MA

CONSOLIDATED ORDER

Adopted: March 7, 1995; Released: March 8, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On June 20, 1994, Cablevision of Boston Limited Partnership, Cablevision of Brookline Limited Partnership, A-R Cable Services, Inc. and CSC Acquisition-MA, Inc. (collectively "Cablevision"), filed a consolidated Appeal of certain local rate orders adopted May 20, 1994 by the Massachusetts Community Antenna Television Commission ("CATC").[1] The CATC filed a Motion for Extension of Time on June 30, 1994, which the Commission granted on July 5, 1994.[2] The CATC filed a Consolidated Opposition to Cablevision's Appeal on August 1, 1994. Cablevision then filed a Consolidated Reply to the CATC's Opposition on August 8, 1994.

2. The parties are in agreement that the CATC's local rate orders for the Communities are identical with respect to the issue being appealed. In the interest of administrative efficiency, the Commission has decided that each of the proceedings is sufficiently related to one another to justify the resolution of Cablevision's Appeal of the various local rate orders in this Consolidated Order.

3. In its local rate orders, the CATC established regulated rates for Cablevision's basic cable service and associated equipment and installation charges, pursuant to the Cable Television Consumer Protection and Competition Act of 1992.[3] Cablevision challenges only those portions of the local rate orders in which the CATC calculated Cablevision's maximum permitted rates using Cablevision's revised figure on Line 301 of Worksheet 3 of its FCC Form 393s, and its original figure for Line 104 on Worksheet 1.[4]

II. STANDARD OF REVIEW

4. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.[5] In ruling on an appeal of a local rate order, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering a local rate order.[7] If the Commission reverses a

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[1] The local rate orders at issue were adopted for the communities of Acton, Bedford, Boston, Brookline, Braintree, Fitchburg, Gardner, Georgetown, Groveland, Haverhill, Hudson, Leominster, Lexington, Lunenburg, Lynnfield, Maynard, Norwood, Peabody, Stow, Sudbury, Templeton, Westminster, and Westwood ("Communities").

[2] Under the terms of the Commission's Order granting the CATC's Motion for Extension of Time, the CATC's deadline for the submission of its Opposition to Cablevision's Appeal was extended until August 1, 1994.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] As part of the rate review process, Cablevision submitted an FCC Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") for each of the Communities to the CATC in November 1993. Cablevision subsequently submitted revised FCC Form 393s to the CATC which included time spent by Cablevision's independent contractors on the repair of remotes and converters. Local franchising authorities review the information contained in the FCC Form 393, or its successor forms, in order to determine cable operators' maximum permitted rates for basic service and associated equipment under the Commission's rate regulations. *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of, 1992: Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5770 (1993) (*"Rate Order"*).

[5] 47 C.F.R. §76.944.

[6] *Rate Order* at 5731 ; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket 92-266, and Buy-Through prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316,4346 (1994).

[7] *Id.*

franchising authority's decision, it will not substitute its own decision, but instead it will remand the issue to the franchising authority with instructions for its resolution.[8]

III. DISCUSSION

5. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations comply with the Commission's rules. FCC Form 393 is divided into three separate, but interrelated, parts. In Part II, the operator calculates its permitted programming rates, while in Part III, the operator calculates its permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the time period under review.

6. The operator's maximum permitted rates are derived by completing Parts II and III of FCC Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation, or as of September 30, 1992 if the operator's current per channel rate exceeds its benchmark per channel rate. After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate exceeds the benchmark rate, the operator must reduce the per-channel rate to the benchmark rate or by 10%, whichever reduction amount is less. After computing the permitted rate level in this manner, monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of FCC Form 393.

7. Cablevision, which restructured its rates as of September 1, 1993, submitted an FCC Form 393 for each of the Communities to the CATC in November 1993. Following a January 31, 1994 prehearing conference attended by both the CATC and Cablevision, Cablevision submitted revised FCC Form 393s for each of the Communities. In the revised FCC Form 393s which it submitted, Cablevision amended the calculation of its Hourly Service Charge ("HSC") in Step A, Part III to include all hours which Cablevision's independent contractors spent repairing converters and remotes. Cablevision's revised calculations resulted in a new higher figure for Line 301 (Monthly Equipment and Installation Cost) on Worksheet 3 of its FCC Form 393s. As it had done in its initial filings with the CATC, Cablevision equated Line 104 (Monthly Equipment Revenue) with Line 301.[9] However, when the CATC reviewed Cablevision's calculations, it used Cablevision's revised entry for Line 301, but retained Cablevision's original entry for Line 104. It is Cablevision's position that this action was in violation of the Commission's rules, as clarified in the November 10, 1993 *Public Notice*. Cablevision contends that the CATC deprived it of the opportunity to recalculate its Base Rate per Channel using the adjusted equipment costs, thus causing its Base Rate per Channel to be artificially low. This, Cablevision contends, lowered the maximum permitted rate for Cablevision's basic service and cable programming service tiers.

8. The CATC claims that it "unlinked" Lines 104 and 301 in order to preserve the underlying mathematical principles of the Commission's benchmark methodology. The CATC claims that when an operator's equipment rates increase or decrease due to changes in Part III of its FCC Form 393, the only way to ensure a proper inverse corresponding change in programming rates is to unlink Lines 104 and 301. Although Cablevision's equipment rates increased due to the revisions made to its FCC Form 393, Cablevision made no corresponding decrease in the maximum permitted per channel rate for programming as required by the Commission's regulations. In order to correct this problem, the CATC retained Cablevision's original entry for Line 104, but it allowed Cablevision to update its Line 301 entry. The CATC claims that had it not unlinked Lines 104 and 301, then Cablevision would have been afforded an unjustified increase in its aggregate maximum permitted rate.

9. Line 301 reflects the costs an operator incurs in an average month for customer equipment and installations. Line 104 reflects an operator's average monthly equipment and installation revenue. Whether substitution of line 301 for 104 on FCC Form 393 is appropriate depends on whether an operator restructured its rates before the initial date of regulation. Restructured, maximum permitted rates for equipment and installation are based on actual cost.[10] If an operator had restructured its rates before September 1, 1993, to comply with benchmark rate regulation, Line 301 and Line 104 should be the same, or nearly the same, because the revenue received for equipment and installation (Line 104) should equal the cost of the equipment and installation plus a reasonable return on investment (Line 301).[11] Since Cablevision did restructure its rates prior to September 1, 1993, Cablevision's entries on Lines 104 and 301 should be the same, or nearly the same. Therefore, the CATC acted unreasonably when it permitted Cablevision to revise Line 301, but prohibited Cablevision from revising Line 104. Accordingly, we remand the local rate order to the CATC for resolution in accordance with the terms of this Order.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, that the consolidated Appeal filed by Cablevision of Boston Limited Partnership, Cablevision of Brookline Limited Partnership, A-R Cable Services, Inc. and CSC Acquisition-MA, Inc. is REMANDED to the CATC for resolution in accordance with the terms of this Order.

11. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

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[8] *Id.*

[9] Cablevision asserts that the Commission, in a November 10, 1993 *Public Notice*, clarified that Line 301 should equal Line 104. *See* "Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements" at 3 (November 10, 1993) ("November 10, 1993 *Public Notice*").

[10] *See* discussion, *supra*, at paragraph 6.

[11] *See* November 10, 1993 *Public Notice* at 3; *See also* New England Cablevision of Massachusetts, Inc., DA 94-1607 (Cab. Serv. Bur., released December 28, 1994).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

TIME WARNER ENTERTAINMENT CO., L.P., d/b/a/ Time Warner Cable of Athol

Motion to Withdraw Petition for Review of Rate Orders Issued by Commonwealth of Massachusetts Community Antenna Television Commission (Towns of Athol and Orange, Massachusetts)

Meredith J. Jones
Chief, Cable Services Bureau

ORDER

Adopted: March 7, 1995; Released: March 8, 1995

By the Chief, Cable Services Bureau:

1. On June 20, 1994, Time Warner Entertainment Co., L.P., d/b/a Time Warner Cable of Athol ("Warner"), filed an appeal of two local rate orders, issued on May 20, 1994 by Warner's franchising authority, Massachusetts Community Antenna Television Commission ("MCATC"). In the local rate orders, MCATC established regulated rates for basic cable service and associated equipment, provided by Warner, as allowed by the Cable Television Consumer Protection and Competition Act of 1992. The local order required Warner to adjust benchmark rates for basic service based on revised GNP-PI data and to issue a refund to the communities in the towns of Athol and Orange, Massachusetts.[1]

2. On September 12, 1994, Warner filed with the Commission a motion to withdraw its earlier-filed petition for review.[2] In its motion, Warner explained that "[n]otwithstanding Time Warner's disagreement with the Massachusetts Cable Commission's decision, Time Warner has nonetheless paid the refunds and the appeal is therefore moot." There being no opposition, Warner's Motion to Withdraw is granted.

3. Accordingly, IT IS ORDERED THAT Time Warner Entertainment Co., L.P.'s Petition for Review of Local Rate Orders of the Massachusetts Community Antenna Television Commission IS DISMISSED.

4. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

[1] On July 29, 1994, the Massachusetts Community Antenna Television Commission filed its "Opposition to Petition for Review of Rate Orders."

[2] Warner entitled its pleading as "Notice of Withdrawal." We, however, will treat this "notice" as a motion by Warner to withdraw its petition for review.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PORT TOWNSEND CABLE TV LTD.

Motion to Withdraw
Appeal of Local Rate Order of
City of Port Townsend

ORDER

Adopted: March 7, 1995; Released: March 8, 1995

By the Chief, Cable Services Bureau:

1. On September 15, 1994, Port Townsend Cable TV Limited ("Townsend") filed an appeal of the local rate order, released on August 18, 1994 by Townsend's franchising authority, the City of Port Townsend, Washington ("the City"). In the local rate order, the City established regulated rates for basic cable service and associated equipment, provided by Townsend, as allowed by the Cable Television Consumer Protection and Competition Act of 1992. The local order required Townsend to issue refunds to customers.

2. On October 4, 1994, Townsend filed with the Commission a motion to withdraw its earlier-filed appeal and stay request.[1] In its motion, Townsend stated that the "Commission review of the City's above-referenced Basic Rate Regulation Order is no longer necessary" because Townsend and the City "have conferred regarding the underlying rate dispute," and "the City has adopted or will adopt an amended rate order." There being no opposition, Townsend's motion to withdraw is granted.

3. Accordingly, IT IS ORDERED THAT Port Townsend Cable TV Limited's Appeal of the Local Rate Order of the City of Port Townsend IS DISMISSED. IT IS FURTHER ORDERED that Port Townsend Cable TV Limited's Petition for Emergency Stay IS DISMISSED.

4. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] Townsend entitled its pleading as "Notice of Withdrawal." We, however, will treat this "notice" as a motion by Townsend to withdraw its appeal and stay request.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI CABLEVISION OF ST. LOUIS

Motion to Withdraw
Appeal of Local Rate Order of
City of St. Louis, Missouri

ORDER

Adopted: March 7, 1995; Released: March 8, 1995

By the Chief, Cable Services Bureau:

1. On April 4, 1994, TCI Cablevision of St. Louis, Inc. ("TCI") filed an appeal of the local rate order, adopted on March 4, 1994 by TCI's franchising authority, the City of St. Louis (the "City"). In the local rate order, the City established regulated rates for basic cable service and associated equipment, provided by TCI, as allowed by the Cable Television Consumer Protection and Competition Act of 1992. The local order mandated rates for equipment well below the rates proposed by TCI.

2. On August 5, 1994, TCI filed with the Commission a motion to withdraw its earlier-filed appeal and stay request.[1] In its motion, TCI stated that "[s]ince the appeal was filed . . . . the City adopted a new cable rate resolution," and therefore that "Commission review of the City's rate order of March 4 is no longer necessary or appropriate." There being no opposition, TCI's Motion to Withdraw is granted.

3. Accordingly, IT IS ORDERED THAT TCI Cablevision of St. Louis, Inc.'s Appeal of the Local Rate Order of the City of St. Louis, Missouri IS DISMISSED. IT IS FURTHER ORDERED that TCI Cablevision of St. Louis, Inc.'s Request for Emergency Stay IS DISMISSED.

4. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] TCI entitled its pleading as "Notice of Withdrawal." We, however, will treat this "notice" as a motion by TCI to withdraw its appeal.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PARAGON CABLE

Motion to Withdraw Appeal of Order
Setting Basic Service and Equipment
Rates of the City of San Antonio

ORDER

Adopted: March 7, 1995; Released: March 8, 1995

By the Chief, Cable Services Bureau:

1. On May 9, 1994, Paragon Cable ("Paragon") filed an appeal of the local rate order, adopted on April 7, 1994 by Paragon's franchising authority, the City of San Antonio, Texas (the "City"). In the local rate order, the City established regulated rates for basic cable service and associated equipment, provided by Paragon, as allowed by the Cable Television Consumer Protection and Competition Act of 1992. Under the local rate order, the City denied Paragon the right to charge a premium distribution fee for the delivery of premium services on multiple outlets and treated Paragon's *a la carte* offering of WTBS and WGN as a regulated tier.

2. On October 11, 1994, Paragon filed with the Commission a motion to withdraw its earlier-filed appeal.[1] In its motion, Paragon stated that "the City adopted a new cable rate resolution" and therefore "that Commission review of the City's Rate Order . . . is no longer necessary." There being no opposition, Paragon's Motion to Withdraw is granted.

3. Accordingly, IT IS ORDERED THAT Paragon Cable's Appeal of the Local Rate Order of the City of San Antonio, Texas IS DISMISSED.

4. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] Paragon entitled its pleading as "Notice of Withdrawal." We, however, will treat this "notice" as a motion by Paragon to withdraw its appeal.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bresnan Communications Company CUID No. MI0030
Wakefield, Michigan

Benchmark Filing to Justify Cable
Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1995; Released: March 9, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider a complaint about the price Bresnan Communications Company ("Bresnan") was charging for its cable programming service ("CPS") tier in Wakefield, Michigan, CUID No. MI0030. Bresnan has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Bresnan's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of- service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Bresnan asserts that its monthly CPS price is justified by its benchmark filing because this price is less than or equal to the maximum permitted charge. Upon review, we have found no apparent errors that would result in Bresnan's CPS tier price exceeding the maximum permitted price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Bresnan Communications Company in Wakefield, Michigan, CUID No. MI0030, IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sammons Communications, Inc. CUID Nos. VA0052,
Colonial Heights, Virginia VA0054
Petersburg, Virginia

Benchmark Filings To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1995; Released: March 9, 1995

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the price Sammons Communications, Inc. ("Sammons") was charging for its cable programming service ("CPS") tier in Colonial Heights, Virginia, CUID No. VA0052, and in Petersburg, Virginia, CUID No. VA0054. Sammons has chosen to attempt to justify its price through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Sammons' price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The complaint filed against Sammons' CPS price in Colonial Heights was served on Sammons on March 29, 1994[11] and was received by the Commission on April 5, 1994. The complaint filed against Sammons' CPS price in Petersburg was served on Sammons, and was received by the Commission, on April 13, 1994.[12]

5. In response to the complaints, Sammons attempted to justify its CPS price through an FCC Form 393 filed on May 10, 1994 for Colonial Heights and on May 23, 1994 for Petersburg. Sammons amended both of its justifications on June 24, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[13] Sammons also submitted information on February 6, 1995 in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[14]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Sammons has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Sammons implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.r

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] The complaint was initially filed on February 28, 1994, but it was returned by the Commission on March 18, 1994 pursuant to 47 C.F.R. § 76.954. The complainant timely filed a corrected complaint on April 5, 1994. *See* 47 C.F.R. § 76.955. The refiled complaint states that it was mailed to Sammons on March 29, 1994. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will consider March 29, 1994 as the service date.

[12] The complaint was initially filed on February 28, 1994, but it was returned by the Commission on March 18, 1994 pursuant to 47 C.F.R. § 76.954. The complainant timely filed a corrected complaint on April 13, 1994. *See* 47 C.F.R. § 76.955. The refiled complaint incorrectly states that it was mailed to Sammons on February 28, 1994. Sammons has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances, we will hhconsider April 13, 1994 as the service date.

[13] *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[14] *Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994); *see also Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures Plan with Respect to Pending Pre-May 15 Benchmark Cases*, DA 95-87 (Jan. 20, 1995).

III. DISCUSSION

6. In its amended benchmark filings of June 24, 1994, Sammons calculated a maximum permitted rate of $11.65 per month (plus franchise fee) for the CPS tier in both Colonial Heights and Petersburg. Upon review of these filings, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Sammons' actual monthly charge for its CPS tier in both Colonial Heights and Petersburg was $11.82 (plus franchise fee). Thus, Sammons has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate.

IV. CONCLUSIONS

7. Upon review of the record herein, we conclude that Sammons' showings support a maximum reasonable CPS tier price of $11.65 per month (plus franchise fee) for the period April 5, 1994 to May 14, 1994 in Colonial Heights and for the period April 13, 1994 to May 14, 1994 in Petersburg.[15] However, we further determine that the total overcharge per subscriber is such a *de minimis* amount that it would not serve the public interest to order a refund.

8. We further conclude that Sammons has submitted in good faith timely optional supplemental filings in response to our December 29, 1994 Public Notice.[16] As provided in the Public Notice, we will relieve Sammons of its obligation to obtain advance Commission approval of adjustments to its CPS price in either Colonial Heights, Virginia or Petersburg, Virginia for one year following the release of this Order.

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the March 29, 1994 complaint against the cable programming service price charged by Sammons Communications, Inc. in Colonial Heights, Virginia, CUID No. VA0052, and the April 13, 1994 complaint against the cable programming service price charged by Sammons Communications, Inc. in Petersburg, Virginia, CUID No. VA0054, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED that the benchmark filings submitted by Sammons Communications, Inc. with respect to Colonial Heights, Virginia, CUID No. VA0052, for the period of April 5, 1994 to May 14, 1994, and with respect to Petersburg, Virginia, CUID No. VA0054, for the period of April 13, 1994 to May 14, 1994, justify a maximum price of $11.65 per month (plus franchise fee) for Sammons Communications, Inc.'s cable programming service tiers.

11. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Sammons Communications, Inc. shall not be required to obtain advance Commission approval of adjustments to its CPS price in either Colonial Heights, Virginia or Petersburg, Virginia for one year following the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[15] This finding is based solely on the representations of Sammons listed in paragraph 5, *supra*. Should information come to our attention that these representations were inaccurate in any material way, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to hhthis proceeding not specifically addressed herein.

[16] *Public Notice: Cable Services Bureau Announces Optional Procedures with hhRespect to Pending Pre-May 15 Benchmark Cases*, DA 94-1556 (Dec. 29, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIMES MIRROR CABLE
TELEVISION OF ORANGE
COUNTY, INC. d/b/a
DIMENSION CABLE SERVICES

Appeal of Local Rate
Order of the City of
Laguna Hills, California

ORDER

Adopted: March 8, 1995; Released: March 10, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 13, 1994, Time Mirror Cable Television of Orange County, Inc. d/b/a Dimension Cable Services ("Dimension"), filed with the Commission an appeal of the local rate order adopted on September 13, 1994 by the City of Laguna Hills, California (the "City").[1] The City stayed its rate order, pending resolution of Dimension's instant appeal. In its order, the City established Dimension's rates for basic cable service, equipment, installations and hourly service charges. As part of this decision, the City found Dimension's collective or package offering ("Preferred Dimension" package) of certain individually offered ("a la carte") channels to be a regulated tier of service and, therefore, included those channels as regulated channels for purposes of its order. The City ordered Dimension to make refunds to subscribers for all payments made in excess of the rates set forth in the City's order for the period September 1, 1993 through July 14, 1994.[2]

2. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[3] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[4] Therefore, the Commission will reverse a franchising authority's decision only if the Commission determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[5] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[6] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[7]

3. Dimension objects to the City's decision to calculate maximum initial permitted rates for basic services by treating Dimension's a la carte package, consisting of American Movie Classics, Turner Network Television, The Discovery Channel and The Nashville Network, as a rate regulated offering. Dimension argues that its a la carte package conforms with Commission rules for unregulated treatment of a la carte packages.[8] Dimension also objects to the City's decision to prevent Dimension from assessing an additional outlet charge to cable programming service subscribers and the City's decision to disallow Dimension's allocation of a portion of its franchise fees to equipment revenues on Form 393. Finally, Dimension contends that the City's requirement that Dimension must issue refunds within 30 days from the date the local rate order was adopted violates Commission procedural rules. We address each issue in turn.

II. DISCUSSION

A. A La Carte Offerings

4. Dimension objects to the City's finding that the channels comprising its Preferred Dimension a la carte package must be included as regulated channels. Dimension argues that its a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourage cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis, and that the package complies with the Commission's a la carte rules in effect at the time the package was created.[9] Dimension further argues that the City's reliance upon the 15 interpretive guidelines announced by the Commission in March, 1994 to determine the regulatory status of Dimension's a la carte channels constituted "retroactive

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[1] The City filed its opposition on October 31, 1994 to which Dimension filed a reply on November 10, 1994.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 (*"1992 Cable Act"*) Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b) (1992) and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[3] 47 C.F.R. § 76.944 (1993).

[4] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5837 (1993) (*"Rate Order"*); and Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket No. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Reconsideration Order"*).

[5] *Id.*

[6] *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

[7] *Second Reconsideration Order*, 9 FCC Rcd at 4217.

[8] *See Rate Order*, 8 FCC Rcd at 5836-5838; *Second Reconsideration Order*, 9 FCC Rcd at 4213.

[9] *See Rate Order*, 8 FCC Rcd at 5836-5838.

rulemaking."[10] The City responds that it properly applied the Commission's guidelines on a la carte packages and concluded that the channels in Dimension's package should be treated as regulated channels.

5. The Dimension a la carte package at issue was first offered to subscribers on September 1, 1993, when Dimension restructured the service offerings on its system which serves the City. Dimension states that its September 1, 1993 restructuring involved offering four channels that previously had been offered on its former cable programming service tier on an individual basis and also as a package that Dimension alleges is not subject to rate regulation.

6. The facts presented in this appeal closely resemble the facts presented in one of our recently issued letter of inquiry orders on a la carte packages, *Dimension Cable Services, Oceanside, California*, 9 FCC Rcd 7311 (Cab. Serv. Bur. 1994). In *Dimension Cable Services*, we found we could not say that it was clear that the Preferred Dimension package offered by Dimension on its Oceanside, California system was not a permissible non-rate regulated offering under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject Dimension to refund liability or to require Dimension to restructure its tiers so as to return the channels offered in the a la carte package to regulated tiers. Instead, we found that, on a prospective basis, the Preferred Dimension package may be treated as a new product tier under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Sixth Order on Reconsideration, MM Docket No. 93-215 Fifth Report and Order*, 10 FCC Rcd 1226 (1995) (*"Going Forward Order"*).[11]

7. We find that the City's determination in its local rate order that the channels comprising Dimension's a la carte package must be included as regulated channels is inconsistent with the action taken in *Dimension Cable Services*. We further find that, in accordance with *Dimension Cable Services*, Dimension's a la carte package should not be treated as a rate-regulated tier of service. Accordingly, Dimension's appeal on this issue is granted and we remand the local rate order to the City for further proceedings consistent with this ruling.[12]

B. Additional Outlet Charges

8. Dimension next contends that the City improperly disallowed its additional outlet charge. Dimension claims that the charge is assessed to recover additional program supplier costs for the cable programming service (CPS) tier and therefore only subscribers receiving the CPS tier are assessed the additional charge. The City does not dispute Dimension's assertion that only CPS subscribers are assessed the charge. Characterizing the charge as related exclusively to programming costs for its CPS tier, Dimension further contends that the City lacked jurisdiction to rule on the matter. The City counters that Dimension did not adequately justify its claim that the charge was due to additional programming costs for CPS tier subscribers. The City states that, since CPS subscribers with additional outlets also receive basic service over the same outlet, it does indeed have jurisdiction to regulate the charge. Additional outlets, the City contends, are equipment used to receive basic service and therefore subject to rate review by the City.

9. The jurisdiction of local franchising authorities to regulate cable television rates is limited to those charges and services associated with the basic service tier.[13] Charges associated solely with the CPS tier are under the Commission's jurisdiction.[14] Because most equipment-related charges imposed on the CPS tier are also imposed on the basic tier, local franchising authorities almost always regulate such charges. In rare instances, however, certain equipment-related charges may be related only to the CPS tier, such as additional programming costs for channels only carried on the CPS tier, placing the charges under Commission jurisdiction. The City does not contest Dimension's assertion that the additional outlet charges at issue are imposed only on CPS subscribers to recover programming costs associated with the CPS tier. Because the additional outlet charges are imposed only in connection with programming carried on the CPS tier, the Commission, not the City, has jurisdiction over this matter.[15] Under the facts of this case, the City should not have issued a ruling regarding these charges. Since the City did not have jurisdiction to reach the additional outlet charge, we remand this issue to the City so that it may modify its local rate order accordingly.

C. Franchise Fees

10. Dimension next contends that the City improperly excluded a portion of its franchise fees ($33,703) from Dimension's rate justification calculations. Dimension included the franchise fees as part of its equipment revenue on Line 204 of Worksheet 2, in Part II of Dimension's Form 393. Dimension argues that the Commission's benchmark rates were calculated by excluding the franchise fee expense on programming service revenues, but not the franchise fee expense on equipment revenues. Dimension claims the City's exclusion of franchise fees from its equip-

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[10] In the *Second Reconsideration Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether 'an a la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Second Reconsideration Order*, 9 FCC Rcd at 4214.

[11] New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order*, 10 FCC Rcd at 1233-38. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at 1243. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

[12] We need not address Dimension's argument with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Reconsideration Order*, in light of the fact that we grant Dimension's appeal on this issue.

[13] *See* 47 U.S.C. § 543(a)(2)(B) (1992).

[14] *Id.*

[15] In Times Mirror Cable Television of Orange County, Inc. (Laguna Hills, California), 10 FCC Rcd 855, 861-62 (Cab. Serv. Bur. 1995), *app. for rev. pending*, we found this charge unreasonable and ordered the operator to eliminate it.

ment revenue resulted in a substantial understatement of its base rate per channel. The City contends that allowing Dimension to include within Line 204 equipment revenues allocable to franchise fees yields a double recovery, once for the amount that effectively becomes embedded in Line 204 and again as franchise fees are added as a pass-through to the maximum permitted rates.

11. The franchise fee issue raised by Dimension's appeal was addressed in one of our cable programming service rate orders, *Times Mirror Cable Television of Orange County, Inc.* (Laguna Hills, California), 10 FCC Rcd 855 (Cab. Serv. Bur. 1995) (*"Times Mirror - Laguna Hills"*). In *Times Mirror-Laguna Hills*, we stated that, if franchise fees are both included in the base from which maximum permitted rates are calculated and permitted as an addition to maximum permitted rates (as a pass-through), the operator would recover these costs twice.[16] We find that, in accordance with *Times Mirror - Laguna Hills*, Dimension should not be allowed to include $33,703 of its franchise fees, from its equipment revenue on Line 204 of Worksheet 2, in Part II of Dimension's Form 393, in justifying its rates for basic cable service, equipment and installations. Accordingly, Dimension's appeal of this issue is denied.

D. Refund Timetable

12. Dimension next contends that the City's requirement that Dimension issue refunds for overcharges within 30 days from the date the local rate order was adopted violates Commission procedural rules. Specifically, Dimension relies on language in our rules which, in the context of cable programming service rate orders, requires operators to issue rate reductions or refunds within 60 days from the date an order is released declaring rates unreasonable and mandating a remedy.[17] The City counters that neither the 1992 Cable Act nor Commission rules address the time period in which a cable operator may be required to implement a refund for the basic tier. Moreover, the City continues, even if its original 30-day refund order was unreasonable at the time, any unreasonableness has been cured by the extra time Dimension has gained due to the stay the City granted, pending resolution of this appeal.

13. The 60-day requirement, on which Dimension relies, applies to cable programming service rate reductions or refunds ordered by the Commission.[18] We have stated, however, that franchising authorities should follow the procedures we adopted for cable programming services in ordering refunds for basic service rates.[19] We have also stated that cable operators should be given the opportunity to provide 30 days' notice of any rate changes or refunds to its subscribers.[20] In providing operators such an opportunity, we further stated that the franchising authority should consider the amount of time required to prepare and send notices and bills reflecting the rate change with particular attention paid to the impact of cycle billing, if applicable.[21] The City's 30-day time limit on issuing refunds does not give Dimension the opportunity to provide its subscribers notice, nor does it appear from the record below that the City gave proper consideration to other issues, such as whether Dimension uses cycle billing. Any stay of its local rate order by the City does not change the result here, because a stay, by definition, precludes action to comply with the order. This issue is therefore remanded to the City for further proceedings consistent with this order.

III. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that Dimension's appeal, with respect to the issue of the regulatory status of its a la carte package, the additional outlet charge outlet issue and the refund timetable, IS GRANTED. IT IS FURTHER ORDERED that Dimension's appeal, with respect to these three issues, IS REMANDED to the City for resolution in accordance with the terms of this Order.

15. IT IS FURTHER ORDERED that Dimension's appeal, with respect to the issue of including franchise fees as a part of equipment revenue on Form 393, IS DENIED.

16. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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16 *Times Mirror - Laguna Hills*, 10 FCC Rcd at 860.
17 *Rate Order*, 9 FCC Rcd at 5867-68.
18 *Id.*
19 *Id.*at 5726.
20 Times Mirror Cable Television of Springfield, Inc. (Springfield, Illinois), DA 95-155 (Cab. Serv. Bur., released February 7, 1995); Questions and Answers on Cable Television Rate Regulation, Question/Answer 3 (released May 18, 1994).
21 *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Interactive Video and Data Service
(IVDS) Licenses

Requests by Lottery Winners to
Extend Construction Deadline

ORDER

Adopted: March 13, 1995; Released: March 13, 1995

By the Chief, Wireless Telecommunications Bureau:

1. Six licensees in the Interactive Video and Data Service (IVDS)[1] have requested[2] a waiver of Section 95.833(a) of the Commission's Rules,[3] which requires that each IVDS system licensee make service available to at least 10 percent of the service area population or geographic service area within one year of the grant of the license, 30 percent of such "build-out" within three years, and 50 percent within five years. The petitioners' licenses were awarded by lottery held September 15, 1993, and were granted on March 28, 1994. By this Order, we waive the one-year IVDS build-out requirement rule for the six licenses. This Order is effective immediately upon release.

2. The petitioners note, first, that until October 20, 1994, a court case was pending that challenged the lottery process used to award these licenses,[4] and that, currently, three Applications for Review[5] before the Commission make similar challenges and might well, if denied, be appealed through the court system. They assert that these challenges have created, and continue to create, uncertainty concerning the continued validity of their licenses, and particularly note that this has made financing more difficult. They argue that their licenses should be free from such uncertainty before system construction is required, because such uncertainty creates justifiable reluctance to commit to binding decisions concerning financing, equipment purchasing, and other considerations related to construction. Enforcement of the current build-out requirement, they argue, will force such decisions prematurely, or, worse, result in an automatic cancellation of licenses and resultant delay of service to the public.[6] They therefore assert that a delay in initial system construction is in the public interest.

3. Two of the entities that have filed the above-noted Applications for Review oppose the requests.[7] These entities assert that the lottery procedure was flawed and, therefore, the granting of the subject licenses was improper. The entities do not address the specific basis for relief cited by petitioners, but only state broadly that such waivers would undermine the integrity of the general rule.

4. Pursuant to Section 1.3 of the Commission's Rules,[8] the Commission may waive a provision of its rules "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest." *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972)). Here, the general rule was intended "to reduce the filing of speculative applications by entities that have no real intention of implementing [IVDS] systems and to avoid the potential for warehousing of IVDS spectrum."[9] On the facts before us, we find that the standard for waiver is met. There has been no evidence presented of speculation or warehousing, and we find it would be unreasonable to require the petitioners to meet the current build-out requirements, given the uncertainty that exists concerning their licenses.[10] Moreover, we find that waiving the one-year construction deadline will not result in delays in service to the public because these licensees will still be required to satisfy the three-year and five-year construction

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[1] *See generally Report and Order* in GEN Docket No. 91-2, 7 FCC Rcd 1630 (1992).

[2] The licensees and filing dates of their requests are as follows: Bay Interactive Ventures Ltd. (Bay), call sign KIVD-0003, February 17, 1995; Anthony K. Benison (Benison), KIVD-0018, August 25, 1994, and March 8, 1995; Cristina P. Del Valle, KIVD-0002, February 8, 1995; Kingdon R. Hughes (Hughes), KIVD-0008, August 25, 1994, and March 8, 1995; Luz Lobaton, KIVD-0017, February 8, 1995; and Vinod K. Sood (Sood), KIVD-0005, August 25, 1994, and March 8, 1995. We have received additional waiver and rule making requests concerning licenses awarded as a result of the initial IVDS auction held July 28-29, 1994. The Commission is considering whether to initiate a rule making proceeding to address suggested amendments to the build-out requirements of Section 95.833(a).

[3] 47 C.F.R. § 95.833(a).

[4] Larry M. Warner, Esq., Trustee, John Calvin Kemmer Inter Vivos Trust v. FCC, No. 93-1668 (D.C. Cir.). The case was dismissed on October 20, 1994.

[5] *See* Genesis Perpetual Trust, "Application for Review," filed October 18, 1993; Edward M. Johnson, "Application for Review," filed March 25, 1994; Jan M. Reed, "Application for Review," filed March 25, 1994. These filings request, *inter alia*, that the results of the lottery be invalidated. These entities have also filed additional, subsequent applications or petitions, challenging the March 28, 1994, issuance of licenses.

[6] We note that eighteen licenses (covering nine IVDS service areas) were granted as a result of the lottery, and only six licensees have requested a waiver of the construction requirement. One of the remaining twelve licensees, IVD Company, call sign KIVD-0013, originally requested a waiver, then withdrew its request because it assertedly had met the one-year requirement.

[7] *See* Edward M. Johnson, "Opposition to Request for Extension of Time to Construct IVDS Facilities," filed February 17, 1995; Jan M. Reed, "Petition to Rescind Authorizations," dated January 11, 1995; Letter from Jan M. Reed to FCC, dated February 16, 1995. Replies to these oppositions were filed by Cristina P. Del Valle and Luz Lobatan on February 22, 1995. The third entity challenging the lottery proceeding and its results, Genesis Perpetual Trust, does not oppose the waiver requests because it "believes that a new lottery or auction will be held for the subject license[s] and any construction extension will become moot." Letter from Genesis Perpetual Trust to FCC, dated February 16, 1995.

[8] 47 C.F.R. § 1.3.

[9] *Report and Order, supra* note 1, at 1640 ¶ 73; *see Memorandum Opinion and Order* in GEN Docket No. 91-2, 7 FCC Rcd 4923, 4925 ¶ 13 (1992).

[10] *See, e.g., In re Rainbow Broadcasting Co.*, FCC 94-122, 9 FCC Rcd 2839, 2846 ¶ 37 (1994); *see also Public Notice*, DA 92-1231, 57 Fed. Reg. 41935, 41936 (Sept. 14, 1992).

benchmarks. Moreover, we believe that providing licensees with additional flexibility in satisfying the construction benchmarks is desirable and consistent with our intent to allow for more flexible use of the spectrum.

5. Our decision makes moot the additional argument made by four petitioners[11] that an alleged lack of IVDS equipment prevents the licensees from ordering and receiving equipment in time to meet the build-out requirement.[12]

6. Accordingly, IT IS ORDERED that the requests of the licensees[13] for waiver of Section 95.833(a) of the Commission's Rules, 47 C.F.R. § 95.833(a), ARE GRANTED to the extent that we waive the one-year construction requirement, while retaining the three-year and five-year requirements, for the six subject licenses. All other requests ARE DENIED. This action is taken pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, by delegated authority. IT IS FURTHER ORDERED that this action IS EFFECTIVE UPON RELEASE.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

[11] *See* Bay, Benison, Hughes, and Sood filings, *supra* note 2.

[12] We have previously stated that we do not intend to relieve IVDS licensees of the construction requirements on the basis that development or deployment of equipment has taken longer than might have been anticipated. *See Report and Order, supra* note 1, at 1639 ¶ 66; *Order, Answers to Questions from the June 6, 1994 Bidders Seminar of the Auction of Narrowband Personal Communications Services (PCS) Licenses and Interactive Video and Data Service Licenses,* Mimeo 43550, released June 17, 1994, at Question 5-2.

[13] *See* note 2, *supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-43

In the Matter of

Amendment of Section 73.202(b), RM-8580
Table of Allotments,
FM Broadcast Stations.
(Grand Junction, Colorado)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 3, 1995; Released: April 14, 1995

Comment Date: June 5, 1995
Reply Comment Date: June 20, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Grand Valley Public Radio Company, Inc. ("petitioner"), permittee of noncommercial educational Station KAFM(FM), Channel 201A, Grand Junction, Colorado, requesting the allotment of Channel 264C1 to Grand Junction and modification of its authorization accordingly.

2. In support of its proposal petitioner advises that it is presently authorized by the terms of its construction permit to operate Station KAFM(FM) on Channel 201A with low power (0.016 kilowatts). Further, petitioner advises that it is constrained from increasing its facilities within the noncommercial reserved portion of the FM band due to the existence of other noncommercial stations operating therein. Therefore, in order to improve the service Station KAFM(FM) provides to Grand Junction, petitioner requests the allotment of Channel 264C1 to that community for its use.[1] Although petitioner does not specifically request that Channel 264C1 be designated as a "reserved" channel limited solely to noncommercial operation, it states its intention to continue offering such service to the community, regardless of the manner in which Channel 264C1 may be allotted. Petitioner also advises that in the event other expressions of interest in providing Grand Junction with service are received, two Class C channels are also available to the community. Therefore, petitioner requests that its authorization be modified to specify Channel 264C1, whether the channel is reserved or not.

3. Although petitioner has not specifically requested that Channel 264C1 be reserved for noncommercial educational use, commercial channels are generally not reserved for such use in allotment proceedings, except where channels in the reserved portion of the FM band (Channels 201-220) are unavailable due to VHF television Channel 6 interference, or are precluded due to the presence of Canadian or Mexican allotments. *See generally, Butte, Montana*, 9 FCC Rcd 2180 (1994); *Buhl, Minnesota*, 9 FCC Rcd 2606 (1994). Petitioner has not demonstrated that either of the two exceptions to the Commission's policy exists in this instance to enable it to be modified to specify operation on Channel 264C1.

4. In view of the above, we will propose to allot Channel 264C1 to Grand Junction since an interest has been expressed in providing an additional wider coverage area service to the community. However, since Channel 264C1 is not an equivalent class channel to Channel 201A, and the channels are not mutually exclusive, petitioner's present authorization cannot be modified to specify operation on the commercial channel. Moreover, the proposed allotment of Channel 264C1 would not fall within any established exception to the Commission's Rules that new allotments must be made available for general application. Therefore, in the event Channel 264C1 is ultimately allotted to Grand Junction, petitioner may submit an application therefor specifying noncommercial educational programming.

5. Accordingly, we will solicit comments on the proposed amendment to the FM Table of Allotments, Section 73.207(b) of the Commission's Rules, with respect to Grand Junction, Colorado, as follows:

	Channel No.	
City	Present	Proposed
Grand Junction, Colorado	222C,226C, 282C,300C	222C,226C, 264C1,282C,300C

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **June 5, 1995**, and reply comments on or before **June 20, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Harry F. Cole, Esq.
Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036

[1] According to Commission records, in addition to Station KAFM, Grand Junction is also served locally by noncommercial educational FM Stations KCIC (Channel 203A), KPRN (Channel 208C1), KJOL (Channel 212C3) and KMSA (Channel 217A).

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-44

In the Matter of

Amendment of Section 73.202(b), RM-8602
Table of Allotments,
FM Broadcast Stations.
(Fair Bluff, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 6, 1995; Released: April 14, 1995

Comment Date: June 5, 1995
Reply Comment Date: June 20, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Atlantic Broadcasting Co., Inc. ("petitioner"), requesting the deletion of vacant and unapplied-for Channel 287A at Fair Bluff, North Carolina, or, in the alternative, the imposition of a site restriction on the Fair Bluff allotment, to accommodate petitioner's pending application to modify Station WDAR-FM's operation.

2. Atlantic is the licensee of Station WDAR-FM, Channel 288C3, Darlington, South Carolina. It states that Station WDAR-FM currently operates with a directional antenna to protect the Channel 287A allotment at Fair Bluff. However, according to the petitioner, if the Fair Bluff channel is deleted, Station WDAR-FM could operate omnidirectionally. Petitioner points out that a construction permit (BPH-890313MQ) had been issued to Great American Media Ltd. I for Station WWIR. However, that construction permit was cancelled on August 31, 1994, pursuant to the permittee's request. If Channel 287A is to be deleted from Fair Bluff, petitioner states that the community will not be deprived of its sole local aural transmission service since it will continue to receive such service from Station WJHB(AM). Alternatively, if an interest in use of Channel 287A at Fair Bluff is expressed, petitioner states that Station WDAR-FM could achieve its desired omnidirectional operation if a 13 kilometer east site restriction is imposed on Fair Bluff Channel 287A. Petitioner further states that the required city-grade service can be provided from the proposed restricted transmitter site.

3. We believe the public interest would be served by seeking comments on the proposed deletion or site restriction of Channel 287A at Fair Bluff since it could enable Station WDAR-FM to expand its coverage area. In accordance with Commission policy, if no party expresses an interest in use of Channel 287A at Fair Bluff, during the comment period in this proceeding, we shall delete the channel for lack of interest. *See Silverton, Colorado*, 9 FCC Rcd 661 (1994), 9 FCC Rcd 4097 (1994).

Technical Summary

4. Channel 287A can be retained at Fair Bluff with a site restriction of 12.7 kilometers (7.9 miles) northeast, at coordinates 34-21-22 North Latitude and 78-54-36 West Longitude, to accommodate petitioner's pending application. Use of these coordinates shows a short-spacing to Station WYNA, Channel 285A, Tabor City, North Carolina, and Station WNMB, Channel 288A, North Myrtle Beach, South Carolina. However, Station WYNA has been modified to specify operation on Channel 285C3 and its community of license has been changed to Calabash, North Carolina, pursuant to MM Docket No. 93-249 (9 FCC Rcd 7857 (1994)), and Station WNMB's license has been modified to Channel 290C3, pursuant to MM Docket 89-326 (7 FCC Rcd 544 (1992)).[1]

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
	Option I	
Fair Bluff, North Carolina	287A	

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **June 5, 1995**, and reply comments on or before **June 20, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, D.C. 20036
(Counsel to petitioner)

8. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice of Proposed Rule Making* to the licensees of Station WYNA, Tabor City, NC, as follows: Great American Media, Inc., Station WYNA, P.O. Box 1151, Raleigh, NC 27602.

[1] An Application to Cover Construction Permit has been filed by Station WNMB on May 3, 1994.

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIRIRIS	File Nos. I-T-C-93-155
SERVICES, INC.	I-T-C-93-278
U.S. DIALTONE CORPORATION	I-T-C-94-058
G.A. BRIEL, INC.	I-T-C-94-268
ARAMTEL, INC.	

Applications for Authority Under Section 214 of the Communications Act of 1934, as amended, to operate as International Resale Carriers

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 31, 1995; Released: April 14, 1995

By the Chief, Telecommunications Division:

1. The four above-captioned applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, 47 C.F.R. § 214 (the Act), request authority to resell the international switched basic services of other carriers.[1] All of the applications were placed on public notice. AT&T opposed the applications of Miriris, USDC, and G.A. Briel. For the reasons stated below, we grant the applications, and deny AT&T's petitions to deny.

2. Miriris is a Florida corporation that seeks authority to offer computer assisted call-back services between international companies and their affiliates located in the United States, the Caribbean, Central America, and South America. USDC, a Delaware corporation, seeks authority to offer resold tariffed international switched voice and facsimile services.[2] G.A. Briel, a Florida Corporation, seeks authority to provide resold tariffed international switched services between the United States and Argentina. Aramtel, a Maryland corporation, seeks authority to resell international switched voice and facsimile services between points in the United States and various foreign countries.

3. AT&T initially filed a petition to deny each application, except Aramtel's, alleging that the applicants intend to provide international "call-back" services by using a method called "code-calling."[3] AT&T cites to the description of Miriris's proposed operations contained in its application, and to the promotion materials of USDC, as evidence that these applicants intend to encourage code-calling. AT&T states that G.A. Briel has not provided enough information in its application to determine if it will engage in code-calling, but petitions to deny its application if G.A. Briel's intends to encourage code-calling. In support of its petition, AT&T restates the arguments it made in the *VIA USA* proceeding, namely that using uncompleted call signalling to facilitate a call-back service is an unreasonable practice under Section 201 of the Communications Act and wire fraud under 18 U.S.C. § 1343.[4]

4. After AT&T filed its petitions in this proceeding, the Commission determined in *VIA USA* that a call-back service using uncompleted call signalling is not an unjust or unreasonable practice under Section 201(b) of the Act, nor is it contrary to the public interest.[5] In addition, the Commission stated that,with respect to AT&T's contention that uncompleted call signalling constitutes wire fraud, the Department of Justice and other U.S. agencies have jurisdiction to investigate such claims.[6]

5. On June 10, 1994, AT&T filed a petition for reconsideration of *VIA USA*. This petition is still pending. In the meantime, AT&T has stated that it no longer objects to the granting of the above-captioned applications "so long as the authority granted is conditioned upon the outcome of the petition for reconsideration in *VIA USA, Ltd.*"[7]

6. Upon consideration of the above-captioned applications and related pleadings, IT IS HEREBY CERTIFIED that the public convenience and necessity require the provision of resold international switched basic services of various U.S. common carriers by Miriris, USDC, G.A. Briel and Aramtel. We agree with AT&T, however, that to the extent that any of these carriers intend to provide international call-back services through the use of uncompleted call signalling, this authorization will be without prejudice to, and is expressly subject to, any future action the Commission may take in response to AT&T's petition for reconsideration in *VIA USA*.

7. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-93-155, I-T-C-93-278, I-T-C-94-058, and I-T-C-94-268 ARE GRANTED and the applicants are authorized to provide international switched basic services by reselling the international switched services of other carriers as listed in their applications.

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[1] The applicants are Miriris Services, Inc. (Miriris), U.S. Dialtone Corporation (USDC), G.A. Briel, Inc. (G.A. Briel), and Aramtel, Inc. (Aramtel).

[2] USDC also states that it will offer an enhanced service using the resold services. Pursuant to *Computer II*, USDC need not seek authority to provide such enhanced services. *See Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 FCC 2d 384 (1980) (*Computer II*). Therefore, the authority granted herein applies only to basic switched services.

[3] Call-back service allows foreign customers to use a foreign facility to dial a telephone number in the United States and receive a dial tone from a switch at the reseller's U.S. location, which the customer can then use to place a call via an outbound switched service of a U.S. carrier. The outbound calls are billed at U.S.-tariffed rates. In a "code calling" configuration, resellers instruct their customers in foreign locations to dial a U.S. telephone number and hang-up after a pre-arranged number of rings, but before the call is completed, and wait for the reseller (usually through a conferencing unit) to return the call to the foreign telephone number, providing the U.S. dial tone to the customer. The foreign customer can make calls via a U.S.-outbound switched service and does not pay the foreign carrier for the initial uncompleted call. The Commission refers to this practice as "uncompleted call signalling." *See VIA USA, Ltd et al.*, 9 FCC Rcd 2288 (1994)(*VIA USA*).

[4] *See Via USA*, 9 FCC Rcd at 2288-2289.

[5] *See id.* at 2290-2291.

[6] *See VIA USA*, 9 FCC Rcd at 2291, n.32.

[7] *See* Letter from Stephen C. Garavito, Senior Attorney, AT&T, to William F. Caton, Acting Secretary, Federal Communications Commission, at 2 (July 8, 1994).

8. IT IS FURTHER ORDERED that AT&T's petition to deny IS DENIED.

9. IT IS FURTHER ORDERED that if the applicants engage in the provision of call-back services, they must do so in a manner that is consistent with the laws of the countries in which they operate.

10. IT IS FURTHER ORDERED that neither the applicants nor any persons or companies directly or indirectly controlling or controlled by the applicants, or under direct or indirect common control with the applicants, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicants or any persons or companies controlling or controlled by the applicants are parties.

11. IT IS FURTHER ORDERED that the applicants shall file with the Commission a copy of any operating agreement they enter into with any of their foreign correspondents within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

12. IT IS FURTHER ORDERED that if an applicant resells services obtained pursuant to contract, the applicant shall file publicly any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. § 203, and the *Interexchange Order*,[8] and the services obtained by the applicant shall be made generally available to similarly situated customers at the same terms, conditions and rates.

13. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

14. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

15. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[8] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991) (*Interexchange Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T CORP.

Application for authority to modify its ownership in the TAT-10 Cable System.	File No. I-T-C-95-112
Application for authority to modify its ownership in the COLUMBUS-II Cable System.	File No. I-T-C-95-113
Application for authority to acquire and operate capacity in the CANTAT-3 Cable System.	File No. I-T-C-95-129
Application for authority to acquire and operate capacity in the Latvia-Sweden Cable System.	File No. I-T-C-95-134
Application for authority to acquire and operate capacity in a cable system between Yemen and Djibouti.	File No. I-T-C-95-141
Application for authority to modify its ownership in the RIOJA Cable System.	File No. I-T-C-95-162
Application for authority to acquire and operate capacity in a cable system between the United Kingdom and Ireland.	File No. I-T-C-95-179

ORDER AND AUTHORIZATION

Adopted: April 4, 1995; Released: April 14, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-95-112, I-T-C-95-113, I-T-C-95-129, I-T-C-95-134, I-T-C-95-141, I-T-C-95-162 and I-T-C-95-179 ARE GRANTED, and AT&T Corp. (AT&T) is authorized to:

a. modify its ownership in the TAT-10 Cable System, in accordance with the Second Supplementary Agreement to the TAT-10 Construction and Maintenance Agreement (C&MA), as follows:

SECTION	AUTHORIZED-MIUs[1] (joint)	(whole)	PROPOSED-MIUs (joint)	(whole)
US-GERMANY	196	13	196	13
US-NETHERLANDS	23	0	23	0
GERMANY-NETHERLANDS	88	2	89	1
TOTALS	307	15	308	14

b. modify its ownership in the COLUMBUS-II Cable System, in accordance with the Second Supplementary Agreement to the COLUMBUS-II C&MA, as follows:

SECTION	AUTHORIZED-MIUs (whole)	(joint)	PROPOSED-MIUs (whole)	(joint)
CANCUN-WEST PALM	111	4	92	4
WEST PALM-VERO-MAGENS BAY	335	459	337	455
MAGENS BAY-SARDINA	57	2	59	0
MAGENS BAY-PALERMO	49	24	50	23
MAGENS BAY-FUNCHAL	5	1	6	0
TOTALS	557	490	534	482

c. acquire on an Indefeasible Right of User (IRU) basis a one-half interest in and operate two MIUs in the CANTAT-3 Cable System;

d. acquire by lease, or other comparable means, and operate necessary overseas connecting facilities;

e. use the facilities in c. and d. above to provide AT&T's regularly authorized services between the United States and Iceland;

f. acquire on an IRU basis a one-half interest in and operate one E-1[2] circuit in the LATVIA-SWEDEN Cable System;

g. acquire by lease, or other comparable means, and operate any necessary overseas connecting facilities;

h. use the facilities in f. and g. above to provide AT&T's regularly authorized services between the United States and Latvia;

i. acquire on an ownership basis a one-half interest in and operate 15 MAUOs[3] of capacity in the ADEN-DJIBOUTI Cable System between Yemen and Djibouti;

[1] A MIU is a unit designated as the minimum unit of investment, allowing the use of 2.048 Mbps (30 MAUOs) and the additional 162,539.68 bps required for multiplexing in each direction. A MAUO is a 64-kbps circuit equivalent.

[2] As described in the LATVIA-SWEDEN IRU Agreement, a half E-1 Unit is a unit designated as the minimum acquirable IRU interests allowing the effective use of 2.048 Mbps.

[3] A MAUO is designated as the Minimum Unit of Ownerhip in this cable, and is a 64-kbps circuit equivalent.

j. acquire by lease, or other comparable means, and operate any necessary overseas connecting facilities;

k. use the facilities in i. and j. above to provide AT&T's regularly authorized services between the United States and Yemen;

l. modify its ownership in the RIOJA Cable System, in accordance with the First Supplementary Agreement to the RIOJA Cable System C&MA, as follows:

SECTION	AUTHORIZED-MIUs (joint)	(whole)	PROPOSED-MIUs (joint)	(whole)
SPAIN-UK	24	0	24	0
UK-BELGIUM	207	13	209	11
BELGIUM-NETHERLANDS	183	13	185	11
TOTALS	414	26	418	22

m. acquire on an ownership basis a one-half interest in and operate 33 MIUs in the CELTIC Cable System between the United Kingdom and Ireland;

n. acquire by lease, or other comparable means, and operate any necessary overseas connecting facilities; and

o. use the facilities in m. and n. above to provide AT&T's regularly authorized services between the United States and Ireland.

3. IT IS FURTHER ORDERED that the authority granted herein is subject to the terms and conditions set forth in the C&MAs of each of the cable systems in which authority is granted.

4. IT IS FURTHER ORDERED that AT&T is authorized to multiply, through the use of Digital Circuit Multiplication Equipment ("DCME"), the bearer channels authorized in this order, thereby deriving up to the maximum attainable channels.

5. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T CORP. File No. I-T-C-95-111

Application for authority
to acquire and operate
additional Digital Circuit
Multiplication Equipment.

ORDER AND AUTHORIZATION

Adopted: April 5, 1995; Released: April 14, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-95-111 IS GRANTED, and AT&T Corp. (AT&T) is authorized to:

a. acquire, install and activate additional Digital Circuit Multiplication Equipment (DCME), on an as needed basis, for the purpose of deriving additional capacity from previously authorized digital bearer channels;

b. acquire by lease, or other comparable means, a one-half interest in and operate any necessary overseas connecting facilities; and

c. use the additional derived capacity and overseas connecting facilities to provide AT&T's regularly authorized services between the United States and the overseas points previously authorized for the digital bearer channels.

3. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-66

In the Matter of

Amendment of Section 73.202(b), RM-8469
Table of Allotments,
FM Broadcast Stations.
(Tyler, Fairfield and
Commerce, Texas)[1]

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 6, 1995; Released: April 14, 1995

By the Chief, Allocations Branch:

1. At the request of Gleiser Communications, Inc. ("petitioner"), licensee of Station KDOK(FM), Channel 221A, Tyler, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3213 (1994) proposing the substitution of Channel 221C3 for Channel 221A at Tyler and modification of Station KDOK(FM)'s license to specify operation on the higher powered channel. In order to accommodate the upgrade at Tyler, an *Order to Show Cause* was issued to Freestone Broadcasting Company, Inc. ("Freestone") and KEMM Communications, Inc., respective licensees of Stations KNES(FM), Channel 221A, Fairfield, Texas, and KEMM(FM), Channel 221A, Commerce, Texas, directing the licensees to demonstrate why their licenses should not be modified to specify operation on Channels 256A and 277A in lieu of Channel 221A, respectively. Petitioner filed comments reiterating its intention to apply for Channel 221C3 and to reimburse the licensees of Stations KNES(FM) and KEMM(FM) for the reasonable cost associated with the change in channels at Fairfield and Commerce, Texas. In response to the *Order to Show Cause*, Freestone and Russell-Fields, Inc. ("RFI")[2] filed joint comments. Petitioner filed reply comments.[3]

2. Freestone and RFI filed comments stating they have no objection to the proposed substitution of channels at Fairfield and Commerce if the two existing licensees are compensated for all of their expenses incurred. They further state that they will only agree to the channel changes if they are compensated to the extent that their respective stations could operate on the new frequencies without financial distress by the channel change. Both submit that any change in frequency at either facility will create major confusion for the two stations' advertisers and listeners, which in turn would most certainly negatively impact on their ability to generate revenue. Finally, Freestone and RFI state any change in operating frequencies without the compensation would severely endanger the ability of their stations to remain viable business entities and provide local broadcast service to the communities where they are licensed.

3. After carefully reviewing the pleading before us, we believe the public interest would be served by substituting Channel 221C3 for Channel 221A at Tyler; the substitution of Channel 256A for Channel 221A at Fairfield; and the substitution of Channel 277A for Channel 221A at Commerce, since it could enable Station KDOK(FM) to expand its coverage area. With respect to the issues raised by Freestone and RFI, the reimbursement costs incurred by the affected stations, both technical and promotional, are left to the good faith negotiation of the parties involved. Reimbursement of costs incurred by the affected stations is governed by the guidelines set forth in *Circleville, Ohio*, 8 FCC Rcd 2d 159 (1967). In this instance, petitioner has acknowledge its responsibility to reimburse Freestone and RFI for the reasonable costs associated with the change in frequency for Station KNES(FM) and Station KEMM(FM).

4. Channels 221C3, 256A, and 277A can be allotted to Tyler, Fairfield and Commerce, respectively, in compliance with the Commission's minimum distance separation requirements. Channel 221C3 can be allotted to Tyler with a site restriction of 1.6 kilometers (1.0 miles) west to accommodate petitioner's desired site.[4] Channel 256A and Channel 277A can be allotted Fairfield and Commerce, respectively, at the transmitter sites specified in Station KNES(FM)'s and Station KEMM(FM)'s authorizations.[5] As requested, we will also modify Station KDOK(FM), Station KNES(FM) and Station KEMM(FM)'s authorizations to specify operation of Channel 221C3, Channel 256A and Channel 277A, respectively.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 29, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Tyler, Texas	221C3, 226C1, 268C, 281C2,
Fairfield, Texas	256A
Commerce, Texas	277A

[1] The communities of Fairfield and Commerce, Texas, have been added to the caption since they were inadvertently omitted.

[2] Russell-Fields Inc. is the licensee of Station KEMM(FM), pursuant to the Commission's grant of the assignment of license on November 22, 1991.

[3] The *Notice* provided incorrect coordinates (North Latitude 32-20-42 and West Longitude 95-10-08) for Channel 221C3 at Tyler. The correct coordinates for Channel 221C3 at Tyler are North Latitude 32-20-42 and West Longitude 95-19-08.

[4] The coordinates for Channel 256A at Fairfield are North Latitude 31-41-52 and West Longitude 96-09-44. The coordinates for Channel 277A at Commerce are North Latitude 33-11-40 and West Longitude 96-01-20.

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Gleiser Communications, Inc., for Station KDOK(FM), Tyler, Texas, IS MODIFIED to specify operation on Channel 221C3, in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the licenses of Freestone Broadcasting Company, Inc. and KEMM Communications, Inc. for Stations KNES(FM) and KEMM(FM), Fairfield and Commerce, respectively, IS MODIFIED to specify operation on Channel 256A and Channel 277A ,in lieu of Channel 221A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Stations KNES(FM) and Station KEMM(FM)'s licenses, except the channels as specified above. Any other changes, except those specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with licenses BLH-850528KF and BLH-820112AA, except for the channels as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensees, as follows:

Freestone Broadcasting Company, Inc.
P.O. Box 347
Fairfield, Texas 75840
[Licensee of Station KNES(FM)]

Russell-Fields, Inc.
c/o of KEMM Communications, Inc.
900 Jackson
Dallas, Texas 75202
[Licensee of Station KEMM(FM)]

9. Pursuant to Commission Rule Section 1.1104(1(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and /or upgrade. As a result of this proceeding, Gleiser Communications, Inc., licensee of Station KDOK(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-45

In the Matter of

Amendment of Section 73.202(b), RM-8605
Table of Allotments,
FM Broadcast Stations.
(Pahrump, Nevada)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 6, 1995; Released: April 14, 1995

Comment Date: June 5, 1995
Reply Comment Date: June 20, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Gregory P. Wells ("petitioner") requesting the allotment of Channel 236A to Pahrump, Nevada, as the community's second local FM service. Petitioner states that he will apply for the channel, if allotted.

2. Channel 236A can be allotted to Pahrump in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.1 kilometers (2.5 miles) west to avoid a short-spacing to Station KWNR, Channel 238C, Henderson, Nevada.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 236A to Pahrump since it could provide the community with its first local competitive FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pahrump, Nevada	298C	236A, 298C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 5, 1995**, and reply comments on or before **June 20, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gregory P. Wells
P.O. Box 590, Suite 145
Pahrump, NV 89041
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of

[1] The coordinates for Channel 236A at Pahrump are 36-13-12 North Latitude and 116-01-43 West Longitude.

the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 12, 1995

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC record.

The decisions are placed in general docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Abundant Life, Inc. - Request for refund of a hearing fee for a new FM station at Hattiesburg, Mississippi - **Denied** (March 16, 1995).

Ariel Broadcasting, Inc. - Request for waiver of a filing fee for a station at St. Augustine, Florida - **Granted** (March 22, 1995).

Austin Radio - Request for refund of filing fees submitted in connection with an application for an extension of time to construct facilities for a new FM station at Austin, Indiana - **Granted** (March 9, 1995).

Blanton, Phil - Request for refund of filing fees submitted in connection with four MDS applications, St. Augustine, Florida - **Denied** (March 29, 1995).

Bott II, Richard P. - Request for refund of filing fees submitted in connection with a construction permit application for a new FM station at Silver Lake, Kansas - **Granted** (March 9, 1995).

Cham, Robert - Request for refund of a filing fee submitted in connection with a construction permit for a new FM station at Marlboro, Vermont - **Denied** (March 16, 1995).

Jackson, Martin J. and Shirley M. - Petition for reconsideration of two applications for LPTV stations at Santa Cruz and Sand Cruz, California - **Denied** (February 23, 1995).

Lakeside Broadcasting, Inc. - Request for refund of filing fees for new FM stations at Taylorville, Illinios; Hermantown, Minnesota; Athens, Ohio; and Balsam Lake, Wisconsin - **Granted** (March 15, 1995).

Libby Video Club - Request for waiver of regulatory fees for eight television translator stations at Libby, Montana - **Granted** (February 3, 1995).

Northern Rural Cable TV Cooperative, Inc. - Request for return of filing fees submitted in connection with two low power television ("LPTV") channels at Bath, South Dakota - **Granted** (March 16, 1995).

Rowland, Sr., Marshall W. - Petition for reconsideration of a decision to deny refund of a hearing fee for a new FM station at Sasser, Georgia - **Granted** (March 14, 1995).

Whedbee Broadcasting Corporation - Request for determination of filing status, Gladstone, Missouri - **Denied** (March 30, 1995).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202)418-1995.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 16 1995

Julia A. Waysdorf, Esq.
Helein & Waysdorf, P.C.
1850 M Street, N.W.
Suite 550
Washington, D.C. 20036

Re: Fee Control # 9310188170040001

Dear Ms. Waysdorf:

This will respond to your request for refund of the hearing fee filed on behalf of Abundant Life, Inc. ("Abundant"), a former applicant for a new FM station at Hattiesburg, Mississippi.

You state, and your documentation shows, that Abundant's application was dismissed by the Chief, FM Branch for failure to remit its hearing fee in accordance with the applicable hearing fee deadline. You further state that Abundant later submitted its hearing fee together with its petition for reconsideration of the dismissal of its application. Abundant's petition was denied by the Office of the Managing Director, and Abundant filed an application for review of that decision, which is pending before the Commission. You maintain that "although Abundant remains ready [sic], willing and able to pay the hearing fee should Abundant's Application for Review be granted, it appears that Abundant is eligible for refund of the hearing fee pursuant to Section 1.1111." Specifically, you contend that a refund is appropriate because Abundant was not required to file a fee for a dismissed application, and because Abundant was involuntarily dismissed prior to being designated for hearing. See 47 C.F.R. Section 1.1111(a), (b)(2).

Contrary to your assertions, under the Commission rules, Abundant was required to submit its hearing fee when it sought review of the staff's dismissal of its application for failure to timely remit its hearing fee. See 47 C.F.R. Section 1.1116(b). Moreover, section 1.1116 does not provide for refund of the underlying fee during the pendency of such review. Therefore, unless Abundant withdraws its pending petition for reconsideration, its request for a refund during the pendency of Commission's review is premature.

Accordingly, your request for a refund must be denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

cc: Ms. Linda F. Garry

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Kenneth Stein, President and General Manager
WAOC Funshine Radio
567 Lewis Point Road Ext.
St. Augustine, Florida 32086

Re: Fee Control # 9412138190178001

Dear Mr. Stein:

This will respond to your request for waiver of the filing fee submitted on behalf of Ariel Broadcasting, Inc. ("Ariel"), licensee of WAOC(AM), St. Augustine, Florida. You state that Ariel did not file an application to construct or request an extension of time to construct, but rather to advise the Commission of its correct coordinates.

The Commission may waive filing fees only upon a showing of good cause and a finding that the public interest will be served thereby. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 961 (1987); see also 47 C.F.R. §1.1115. We have determined that Ariel has demonstrated good cause for waiver of the filing fees, and that the public interest would be promoted by the accurate description of the station's coordinates, which outweighs any processing costs that the Commission may incur.

Accordingly, your request for a waiver of the filing fee is granted. A check, made payable to the maker of the original check and drawn in the amount of $230.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 1995

Mr. Keith Reising
1680 Highway, 62 N.E.
Corydon, Indiana 47112

Dear Mr. Reising:

This will respond to your request for refund of the filing fee submitted on behalf of Austin Radio, in connection with its application for an extension of time to construct its facilities for a new FM station at Austin, Indiana.

You state, and your documentation shows, that Austin Radio's extension application was filed months before the expiration of the construction period. By letter dated February 17, 1994, the FM Branch of the Mass Media Bureau so informed Austin Radio, and thus dismissed the filing as unnecessary.

Under the circumstances, since Austin Radio was not required to file the extension application, refund of the filing fee is warranted. See 47 C.F.R. §1.1111(a). Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $200.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Mr. Phil Blanton
2 Brigantine Ct.
St. Augustine, Florida 32084-5973

Re: Files # 4045 CM P-92
4185 CM P-92
3708 CM P-92
3616 CM P-92

Dear Mr. Blanton:

This will respond to your request for refund of the filing fees submitted in connection with your four MDS applications. You claim that you have withdrawn your applications voluntarily and thus that you are entitled to refunds.

In light of the numerous recent rule changes affecting MDS applications and processing requirements, the Commission has stated, "if . . . any applicant whose application is currently pending withdraws prior to the issuance of the public notice designating its application for random selection, its application fee will be refunded." See Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, 8 FCC Rcd 1444, 1449 n.49 (1993). At the time you requested withdrawal of your four MDS applications, the applications were not pending. Rather, your applications previously had been dismissed and returned as unacceptable for filing. Under the circumstances, it does not appear that you are entitled to refunds. See 47 C.F.R. §§1.1107. 11(a)(4).

Accordingly, your request is denied. If you have any questions, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR [illegible]

Harry C. Martin, Esq.
Reddy, Begley & Martin
1001 22nd Street, N.W.
Washington, D.C. 20037

Re: Fee Control # 9312278195541004

Dear Mr. Martin:

This will respond to your request for refund of the filing fee filed on behalf of Mr. Richard P. Bott II, in connection with the December 27, 1993, amendment to his construction permit application for a new FM station at Silver Lake, Kansas.

You state, and your documentation shows, that the Mass Media Bureau dismissed Mr. Bott's amendment as not acceptable for tender in accordance with section 73.203(a) of the Commission's rules, 47 C.F.R. Section 73.203(a). You state that Mr. Bott subsequently resubmitted his amendment as minor change application together with another filing fee. Thus, Mr. Bott essentially submitted two applications with two separate fee payments, but only one application was processed. It would appear that, under the circumstances, refund of the first filing fee payment is warranted. See 47 C.F.R. Section 1.1111(a).

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the amount of $565.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 16 1995

Mr. Robert Cham
9D Main Street
Bristol, Vermont 05443

Re: Fee Control # 9212148195670001

Dear Mr. Cham:

This will respond to your request for refund of a filing fee that was submitted in connection with your construction permit application for a new FM station at Marlboro, Vermont.

You state that your application was filed after the applicable filing window and was placed in the processing queue. Under the Commission's "first-come, first-serve" FM processing procedures, a queue applicant's rights only ripens upon a final determination that the lead application, as well as any predecessors in the queue, are found unacceptable and the queue's applicant is reached and accepted. See Report and Order, 50 Fed Reg. 19936, 19939 (May 13, 1985), recon. denied, 50 Fed. Reg. 43157 (Oct. 25, 1985). You state further that your application was not reached, that the construction permit was granted to an earlier filed application, and thus that you are entitled to a refund of your filing fee.

Section 1.1111(c) of the Commission's rules, 47 C.F.R. Section 1.1111(c), provides that an applicant for a first-come, first-serve construction permit will be entitled to a refund only if he requests that the Commission refund his filing fee and dismiss his application, within fifteen days of the issuance of the Public Notice, which states that an application for the same channel had been previously filed. In this regard, the Commission has stated that "no refund will be available for those applicants who wish to remain on file queued behind the first applicant." See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1989, 6 FCC Rcd 5919, 5926 (1991). Thus, a refund of your filing fee is not warranted, because you had remained in the queue, and had not requested dismissal of your application and refund of your fee within the requisite time period.

Based on the foregoing, your request for a filing fee refund is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB 2 . .

Martin J. and Shirley M. Jackson
340 Sand Hill Road
Scotts Valley, California 95066

Re: Fee Control # 000000BCB-95-019

Dear Mr. and Mrs. Jackson:

This will respond to the petition for reconsideration in which you seek further review of the Billings and Collections Branch's decision to return your applications for LPTV Channel 19, Santa Cruz, California, and LPTV Channel 21, Sand Cruz, California.

You fully acknowledge that you submitted a single Form 155 and a single fee payment ($850.00) to cover both Channel 19 and Channel 21 LPTV applications, but nevertheless contend that your applications should be reinstated. You claim that the Commission's fee form did not clearly prohibit multiple application filings. Moreover, you state that the dismissal of your LPTV applications is a harsh result. This is particularly onerous since you have already waited a year for the applicable window for filing LPTV applications and have devoted considerable effort and expense in pursuing these applications which, if granted, could bring two channels into a terrain-shielded market.

It should be noted that the Commission's new fee procedures allow a single fee form (Form 159, which replaced Form 155) and a single payment instrument to be used to cover multiple applications filed within the same lockbox. See Implementation of Section 9 of the Communications Act -- Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, 59 Fed. Reg. 30984, 30990 (June 16, 1994). However, the Commission's new fee procedures unfortunately were not in effect at the time you filed the two LPTV applications, and the new procedures are not retroactive.

At the time you filed your LPTV applications, the Commission's rules clearly required that a separate fee form and a single payment instrument must accompany each application or filing. See 47 C.F.R. Section 1.1108(b); see also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Reconciliation Act of 1989, 5 FCC Rcd 3558, 3569 (1990)("A separate Fee Form will be required for each distinct application. . . ."). Moreover, the Commission's rules clearly established the consequences for failure to comply with the payment method: An application that is submitted with a fee payment "in an improper form" is subject to immediate dismissal. See 47 C.F.R. Section 1.1107(b).

We have addressed and rejected similar arguments. See Elgar Partnership, 2 FCC Rcd 2873 (1993), a copy of which is enclosed. Specifically, we found that the Commission's rules were

clear both with respect to the "one fee and Form 155 per application" requirement and "the consequences for failure to comply" with that requirement, and that "the Commission's interest in maintaining the integrity and efficiency of its fee collection program through strict enforcement" outweighed the harsh result of dismissal of the multiple applications. Id. at 2874.

Based on the foregoing, reinstatement of your LPTV applications is not warranted. Accordingly, your petition for reconsideration is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

Enclosure

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 15 1995

John J. Schauble, Esq.
Cohen and Berfield, P.C.
1129 20th Street, N.W.
Washington, D.C. 20036

Re: FeeControl # 9404118195714005
Fee Control # 9404118195715001
Fee Control # 9404138195718004
Fee Control # 9405028195743010

Dear Mr. Schauble:

This will respond to your request for refund of the filing fees filed on behalf of Lakeside Broadcasting, Inc. ("Lakeside"), a former applicant for four new FM stations.

You state, and your documentation shows, that Lakeside's original applications were dismissed because the applications were filed after the Commission's decision to stay comparative broadcast proceedings and suspend cut-off lists and window filings for new FM applications. See Public Notice, "FCC Freezes Comparative Proceedings," 9 FCC Rcd 1055 (1994). You further state that Lakeside filed petitions for reconsideration, and sought reinstatement of, the dismissal of its four FM applications. Lakeside recently has withdrawn its petitions for reconsideration, and thus is now seeking a refund of its filing fees.

The Commission's rules generally require that applicants submit the requisite fees, together with their requests for review of dismissals of applications, in order to eliminate any delays that would result from later billing applicants where the circumstances warrant reinstatement of their applications. See 47 C.F.R. Section 1.1116(b); see also Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 3 FCC Rcd 5987, 5991 (1988). Lakeside thus was not entitled to a refund of its filing fees pending action on its petitions for reconsideration. However, given that Lakeside has now withdrawn its petitions for reconsideration, refund of the filing fee payments is appropriate.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the total amount of $8,120.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

FEB [illegible]

Mr. James A. Nelson
President, Libby Video Club
P. O. Box 977
Libby, Montana 59923

Dear Mr. Nelson:

This is in response to your letters concerning the regulatory fee for eight television translator stations operated by the Libby Video Club (Libby) of Libby, Montana, forwarded to the Commission through the offices of Senator Max Baucus and Congressman Pat Williams.

Your letters are being considered as a request for waiver of the regulatory fee for your translator stations. You maintain that Libby is a non-profit entity providing the only television service to rural residents of northwestern Montana who cannot afford cable television service or to receive television signals via satellite. With eight translator stations, each subject to a $135 regulatory fee, Libby's total regulatory fee payment would total $1,080. Libby is funded by donations of $25 per year from about 250 households for a total income of approximately $6,000 annually. All funds received by Libby are used for the operation and maintenance of its translators. Any excess funds are used to obtain new equipment. Libby has no paid members on its board and, to the extent possible, it uses volunteers to operate and maintain its translator facilities.

In establishing the regulatory fee program, Congress provided an exemption from the fee requirement for nonprofit entities. 47 U.S.C. § 159(h). Thus, the Commission's rules exempt nonprofit entities "possessing nonprofit, tax exempt status under section 501 of the Internal Revenue Code" from the regulatory fee requirement. 47 CFR § 1.1161(c). In addition, the Commission, as contemplated by Congress, has provided for waiver of regulatory fees on a case-by-case basis in those instances in which "waiver would promote the public interest." 47 CFR § 1.1165.

Because Libby does not possess a Determination Letter from the Internal Revenue Service establishing its nonprofit status, it does not qualify under the Commission's rules that provide an express exemption from its regulatory fees. However, section 9(h) of the Communications Act exempts all nonprofit entities from payment of regulatory fees. Libby's representations establish that it is a nonprofit entity within the meaning of section 9(h) of the Communications Act because it neither derives

nor seeks to derive profit from its translator service and because it is supported by voluntary contributions from members of the general public. As represented, we find therefore that Libby is entitled to an exemption from the Commission's regulatory fee requirement for its translator stations.

A copy of this letter should be included in any future correspondence with respect to the regulatory fees exemption. If you have any question about the fee, please call the Chief, Fee Section at (202) 418-1995.

Finally, in response to your concern about Libby's non-profit status, the Commission grants noncommercial, educational translator licenses only in limited instances. Further information on obtaining noncommercial, educational status may be obtained from Ms. Molly Fitzgerald at (202) 418-1600.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

cc: Senator Max Baucus
Congressman Pat Williams

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 16 1995

Dennis W. Hagny, General Manager
Northern Rural Cable TV Cooperative, Inc.
P.O. Box 488
Bath, South Dakota 57427-0488

Re: Fee Control # 000000BCB-94-002

Dear Mr. Hagny:

This will respond to your request for refund of the filing fees filed on behalf of Northern Rural Cable TV Cooperative, Inc. ("Northern"), a former applicant for two low power television ("LPTV") channels.

You state, and your documentation shows, that Northern's original applications were dismissed for failure to remit the requisite filing fees with its LPTV applications. You further state that Northern later submitted the filing fees together with its request for reinstatement of the dismissed applications, but that the Office of Managing Director denied its request for reinstatement. Therefore, Northern requests refund of the filing fees.

The Commission's rules require that applicants submit the requisite fees, together with their requests for review of dismissals for failed fee payments, in order to eliminate any delays that would result from later billing applicants where the circumstances warrant reinstatement of their applications. See 47 C.F.R. Section 1.1116(b); see also Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 3 FCC Rcd 5987, 5991 (1988). Northern appropriately remitted its fees with its request for reinstatement of the LPTV applications. Under the circumstances, given the Office of the Managing Director's decision not to reinstate the LPTV applications, Northern is entitled to a refund of the filing fees.

Accordingly, your request is granted. A check, made payable to the maker of the original check and drawn in the total amount of $850.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

APR 05 1995

OFFICE OF
MANAGING DIRECTOR

Dennis W. Hagny, General Manager
Northern Rural Cable TV Cooperative, Inc.
P.O. Box 488
Bath, South Dakota 57427-0488

Dear Mr. Hagny:

Enclosed please find the two original checks submitted as filing fees on behalf of Northern Rural Cable TV Cooperative, Inc. for two low power television channels.

A recent letter was sent to you from Marilyn J. McDermett granting your requested for a refund. However, since the original checks were never deposited, we are returning them to you.

If you have any questions, please feel free to contact me at (202) 418-1995.

Sincerely,

Claudette E. Pride

Claudette E. Pride
Chief, Fee Section

Enclosures -- 2
Check #01815 - $425
Check #01816 - $425

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 14 1995

Gary Smithwick, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036

Re: Fee Control # 9403148170063001

Dear Mr. Smithwick:

This responds to a petition for reconsideration filed on behalf of Marshall W. Rowland, Sr., applicant for a new FM station at Sasser, Georgia. Mr. Rowland seeks review of the Office of Managing Director's denial of his request for refund of his hearing fee.

Mr. Rowland states, and our records indicate, that the Public Notice, Report No. NA-174, released January 4, 1994, announced that Mr. Rowland's application was accepted for filing and established March 10, 1994, as the hearing fee deadline. Mr. Rowland timely submitted his fee on March 10, 1994. Mr. Rowland simultaneously requested a refund of his hearing fee and sought a ruling from the Commission,[1] as to whether the fee payment was suspended by the Commission's decision to freeze comparative hearings. See Public Notice, "FCC Freezes Comparative Proceedings" ("Freeze Public Notice"), 9 FCC Rcd 1055 (1994). The Office of Managing Director determined that hearing fees filed prior to the release of the Freeze Public Notice were not suspended, and denied Mr. Rowland's requested refund. Mr. Rowland states that he filed his hearing fee after, not before, the February 25, 1994 release date of the Freeze Public Notice, and thus maintains that the Office of Managing Director erroneously denied his refund request.

The Commission's Freeze Public Notice stayed comparative broadcast proceedings following the decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), which invalidated the Commission's integration policy as arbitrary and capricious. The Freeze Public Notice established that during the stay, cut-off lists and window filings for new FM filings would not be issued, and that pending predesignation procedures (including hearing fee payments) would be suspended. The Commission clarified its freeze policy with respect to hearing fee payments, and stated:

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[1] It should be noted that Mr. Rowland did not serve a copy of his request for a ruling and a refund on the other mutually exclusive applicant, and requests a determination from the Office of Managing Director whether it was so required to do so. Given the circumstances, it would appear that Mr. Rowland's request was akin to a request for a declaratory ruling, and thus was not subject to ex parte restrictions. See 47 C.F.R. Section 1.1204(a)(8).

> We reiterate that hearing fee requirements have been suspended. Thus, hearing fees due on any date after February 25 should not be submitted. Any party who has submitted a hearing fee after February 25 may request a refund through the Office of Managing Director.

Modification of FCC Comparative Proceedings Freeze Policy, 9 FCC Rcd 6689, 6690 (1994). Under the circumstances, since Mr. Rowland filed his hearing fee after the release of the Freeze Public Notice, in accordance with the applicable hearing fee deadline, refund of the hearing fee is appropriate.

Accordingly, Mr. Rowland's petition for reconsideration is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Andrew S. Fishel
Managing Director

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 14 1995

Gary Smithwick, Esq.
Smithwick & Belendiuk, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036

Re: Fee Control # 9403148170063001

Dear Mr. Smithwick:

This responds to a petition for reconsideration filed on behalf of Marshall W. Rowland, Sr., applicant for a new FM station at Sasser, Georgia. Mr. Rowland seeks review of the Office of Managing Director's denial of his request for refund of his hearing fee.

Mr. Rowland states, and our records indicate, that the Public Notice, Report No. NA-174, released January 4, 1994, announced that Mr. Rowland's application was accepted for filing and established March 10, 1994, as the hearing fee deadline. Mr. Rowland timely submitted his fee on March 10, 1994. Mr. Rowland simultaneously requested a refund of his hearing fee and sought a ruling from the Commission,[1] as to whether the fee payment was suspended by the Commission's decision to freeze comparative hearings. See Public Notice, "FCC Freezes Comparative Proceedings" ("Freeze Public Notice"), 9 FCC Rcd 1055 (1994). The Office of Managing Director determined that hearing fees filed prior to the release of the Freeze Public Notice were not suspended, and denied Mr. Rowland's requested refund. Mr. Rowland states that he filed his hearing fee after, not before, the February 25, 1994 release date of the Freeze Public Notice, and thus maintains that the Office of Managing Director erroneously denied his refund request.

The Commission's Freeze Public Notice stayed comparative broadcast proceedings following the decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), which invalidated the Commission's integration policy as arbitrary and capricious. The Freeze Public Notice established that during the stay, cut-off lists and window filings for new FM filings would not be issued, and that pending predesignation procedures (including hearing fee payments) would be suspended. The Commission clarified its freeze policy with respect to hearing fee payments, and stated:

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[1] It should be noted that Mr. Rowland did not serve a copy of his request for a ruling and a refund on the other mutually exclusive applicant, and requests a determination from the Office of Managing Director whether it was so required to do so. Given the circumstances, it would appear that Mr. Rowland's request was akin to a request for a declaratory ruling, and thus was not subject to ex parte restrictions. See 47 C.F.R. Section 1.1204(a)(8).

> We reiterate that hearing fee requirements have been suspended. Thus, hearing fees due on any date after February 25 should not be submitted. Any party who has submitted a hearing fee after February 25 may request a refund through the Office of Managing Director.

Modification of FCC Comparative Proceedings Freeze Policy, 9 FCC Rcd 6689, 6690 (1994). Under the circumstances, since Mr. Rowland filed his hearing fee after the release of the Freeze Public Notice, in accordance with the applicable hearing fee deadline, refund of the hearing fee is appropriate.

Accordingly, Mr. Rowland's petition for reconsideration is granted. A check, made payable to the maker of the original check and drawn in the amount of $6,760.00, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 418-1995.

Sincerely,

Andrew S. Fishel
Managing Director

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

MAR 3 [illegible]

Mr. James E. Whedbee, President
Whedbee Broadcasting Corporation
3521 Northeast 72nd Street, #66
Gladstone, Missouri 64119-1253

Dear Mr. Whedbee:

This will respond to your letter of March 1, 1995, in which you request a determination regarding the filing status of Whedbee Broadcasting Corporation ("Whedbee Broadcasting") for fee assessment purposes.

You contend that Whedbee Broadcasting should be considered a governmental entity operating in Harrison County, Missouri, and thus exempt from submitting a filing fee in connection with its request for special field test authority. In this connection, you represent that Whedbee Broadcasting exercises a form of joint control with the Harrison County Commission over certain parcels of land located in Harrison County. As supporting documentation, you have enclosed a ratified agreement between Whedbee Broadcasting and the Harrison County Commission.

Section 158 of the Communications Act, 47 U.S.C. Section 158(h), exempts governmental entities from the filing fees requirement. However, neither section 158(h) nor the underlying legislative history defines the term "government entities." The Commission's implementing regulations define government entities as "any state, possession, city, county, town, village, municipal corporation or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs." See 47 C.F.R. Section 1.1113(f). Entities are deemed exempt under section 1.1113(f) if they satisfy the "publicly elected and/or duly appointed" criterion. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC Rcd 947, 960 (1987). The Commission recognized that this definition would exclude many private entities and associations that provide "valuable health, safety and welfare services to the public in conjunction with or in lieu of government entities," but determined that a narrow definition was necessary in order to accomplish the implicit congressional goal that the Commission's processing costs not be shifted to or borne by state and local governments. See Notice of Proposed Rulemaking in Gen. Docket No. 86-285, 51 F.R. 25792, 25800 (July 16, 1986).

Whedbee Broadcasting does not satisfy the "publicly elected and/or duly appointed" criterion. Notwithstanding its arguments to the contrary, Whedbee Broadcasting is a private corporation that, to a certain extent and for limited purposes, may act in conjunction with the Harrison County Commission, which is a government entity. However, Whedbee Broadcasting, itself, is not a government entity under the definition of section 1.1113(f), and thus is not exempt from submitting a filing fee with its request for special field test authority. For fee collection

purposes, a request for special field test authority is treated as a request for special temporary authority. See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 5 FCC Rcd 3558, 3660 (1990); see also 47 C.F.R. Section 1.1104(2)(h)(ii).

It should be noted that the Commission may waive filing fees, upon a showing of good cause, and a finding that the public interest will be served thereby. See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 FCC at 961. Whedbee Broadcasting's submissions, however, only addressed its purported exempt government status. Whedbee Broadcasting did not make or advance any good cause showing that would justify waiving the applicable fee, nor did it comply with the requirements of 47 C.F.R. Section 1.1116(e) in requesting a waiver.

Based on all of the foregoing, your request for exempt government status for Whedbee Broadcasting is denied.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

DA 95-199

News media information 202/418-0500 Recorded listing of releases and texts 202/418-2222

February 9, 1995

UNITED AND CENTRAL TELEPHONE COMPANIES REQUEST APPROVAL OF REVISED ZONE DENSITY PRICING PLAN

Pleading Cycle Established

COMMENTS: February 24, 1995

REPLY COMMENTS: March 3, 1995

On January 17, 1995, Sprint/United Management Company, on behalf of United Telephone Company of Florida (United) and Central Telephone Company of Florida (Central), requested that the Commission approve revisions to United's and Central's zone density pricing plans.[1] United and Central propose to combine their individual zone density pricing plans for two Florida jurisdictions under a single plan. The methodology used to classify central offices into zones under the combined Florida density zone plan is identical to that used in the individual zone plans, except that the zone classification breakpoints have been revised.

Interested parties may file comments on the United and Central request no later than February 24, 1995. Replies must be filed by March 3, 1995.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 CFR § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with

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[1] See Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992), aff'd, 9 FCC Rcd 5154 (1994)(the Commission permitted Tier 1 local exchange carriers, except those companies that remain in the National Exchange Carrier Association pool, to introduce density zone pricing of interstate high-capacity special access in a study area after their expanded interconnection offerings are operational in that study area).

the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington D.C. 20554.

For further information, contact Wendy I. Kirchick, Tariff Division, Common Carrier Bureau, (202) 418-1530.

- FCC -

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

DA 95 - 438

In the Matter of	)	
	)	Transmittal Nos. 8173, 8174
	)	8175 and 8176
AT&T Communications	)	
Tariff F.C.C. Nos. 1 and 13	)	

ORDER

Adopted: March 9, 1995 ; Released: March 10, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On February 16, 1995, AT&T Corp. (AT&T) filed the above-referenced transmittals proposing amendments to various provisions in its tariffs. One portion of Transmittal No. 8173 was filed on 15 days' notice to increase rates for certain Area Code Calling Plan, Any Hour Saver Plan and Block-of-Time Calling Plan rate elements.[1] Transmittal No. 8174 raises rates for various international services, including calling card calls, operator assisted calls, international Dial Station calls, and various USADirect services, among other things. Transmittal No. 8175 introduces a Reach Out-World Special Weekends promotion and a Reach Out-World promotion. Transmittal No. 8176 increases the usage charges for International Dial Station rates for calls from Hawaii to certain overseas locations.

2. On February 27, 1995, Gerald Schwartz, an individual acting *pro se*, filed a petition to reject, suspend and investigate, AT&T Transmittal Nos. 8172[2] through 8176.[3] AT&T did not file a reply to the petition.

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[1] On February 24, 1995, AT&T filed Transmittal No. 8208, which amended Transmittal No. 8173 by adding a rate schedule for the Commercial Area Code Calling Plan.

[2] Transmittal No. 8172 increases the per call rates for AT&T's domestic and international operator handled calls.

[3] The Tariff Division also received a letter from Keith Maydak, an individual, protesting AT&T's increases to its rates in Tariff F.C.C. No. 1, as contained in Transmittal Nos. 8172 through 8176. This letter merely asks the Commission to "review any and all AT&T rate increases prior to allowing the revised tariffs to go into efffect" and to "inquire into" alleged

3. In its petition, Schwartz protests all of the rate increases contained in the above-referenced tariff transmittals on the grounds that: (1) AT&T is increasing these rates solely for the purpose of misleading the public relating to its real rate structure; (2) AT&T offsets its advertised discounts with rate increases; (3) AT&T's requests in these transmittals are meant to hamper competition by increasing rates so that AT&T can then offer "sham" discount programs; (4) AT&T's rate increase is excessive and unjustified; (5) AT&T's rate increase is unnecessary; (6) AT&T's rate increase is for the sole purpose of obtaining funds for deceptive advertising and to offset its discounts; and (7) AT&T's competition will be harmed because AT&T will be able to claim larger discounts when its net profit will remain unchanged.

4. Some of the domestic rate increases in Transmittal No. 8173 took effect on March 3, 1995. That portion of the transmittal was filed on 15 days' notice and, as to that portion of the transmittal, the petition would have been due on February 23, 1995. Schwartz's petition was, therefore, not timely filed as to this portion of this transmittal. The remainder of Transmittal No. 8173 and all of the other transmittals are scheduled to take effect on April 2, 1995.

5. The Tariff Division has reviewed AT&T Communications' Transmittal Nos. 8174 through 8176 and the related pleadings. We conclude that these filings do not warrant rejection because they do not, on their face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject and suspend and investigate AT&T Communications Tariff F.C.C. Nos. 1 and 13, Transmittal Nos. 8172, 8173, 8174, 8175 and 8176, filed by Gerald Schwartz, an individual, IS DENIED as to Transmittal Nos. 8174, 8175 and 8176, and DISMISSED as to the portion of Transmittal No. 8173 filed on 15 days' notice. We take no action at this time on Transmittal No. 8172 or on the portion of Transmittal No. 8173 that was filed on 45 days' notice.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

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misleading activity with regard to the above-referenced transmittals. It does not request rejection, suspension or investigation as specified in Section 1.773(a) of the Commission's rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 94-277

In re Applications of	)	
	)	
Fox Television Stations, Inc.	)	
	)	
For A Permit to Transmit Program Material to Mexican Broadcast Stations XETV, Tijuana, XHNUL-TV, Nuevo Laredo and XHRTA-TV, Reynosa-Matamoros.	)	File Nos. BFP-940217AG BFP-940802AF

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1994 **Released:** January 24, 1994

By the Commission:

1. Fox Television Stations, Inc. ("Fox"), is the licensee of eight American television stations. Fox also supplies television programming to other stations pursuant to contractual agreements. In the present case, Fox seeks our permission to transmit live program material to three Mexican stations. FCC permits for such transmissions are necessary pursuant to Section 325(c) of the Communications Act of 1934 which requires Commission authorization when a studio located within the United States will electronically transmit program material to a foreign station for the purpose of that station's retransmission of the programs back into the United States. See 47 U.S.C. § 325(c). Here Fox proposes to use a studio in California to electronically transmit games of the National Football League and other live programming to Mexican stations XETV, XHNUL-TV, and XHRTA-TV.[1] These Mexican stations are received consistently in the American communities of San Diego, California; Laredo, Texas; and Brownsville, Texas, respectively and, we shall refer to each application by the name of the American city potentially affected. For example, Fox's application to send programming to XETV is "the San Diego application".

2. Bay City Television, Inc. ("Bay City"), a U.S. corporation which represents XETV in its acquisition of programming from Fox and a variety of other sources, filed pleadings in support of Fox's San Diego application. Channel 51 of San Diego, Inc. ("Channel 51"), which is licensed to operate U.S. broadcast station KUSI-TV in San Diego, filed a Petition opposing Fox's San Diego application. Channel 51 attempted to affiliate with Fox several years ago, but was unsuccessful. Apparently, one factor in Fox's choice of XETV over KUSI-TV was that the signal of XETV, a VHF station, could cover more of San Diego than that of KUSI-TV, a UHF station. See generally Fox's Opposition to Channel 51's Petition

[1] The call sign of XHRTA-TV is being changed to XHFOX. The call sign of station XHNUL-TV is being changed to XHFTX.

to Deny at 8 and Attachment B. Fox's Laredo application is also contested. Century Development Corporation ('Century"), the licensee of American VHF station KGNS-TV in Laredo, filed a Petition to Deny that application. Century also indicates a willingness to affiliate with Fox. Fox's choice of Mexican station XHNUL-TV over KGNS-TV was apparently due, in part, to KGNS's existing affiliation with another national network. See generally Fox's Opposition to Century's Petition to Deny at 9. Fox's Brownsville application is unopposed.

3. The petitioners argue that a grant of Fox's San Diego and Laredo applications would be contrary to the public interest because Mexican stations XETV and XHNUL-TV allegedly fail to broadcast informational programming responsive to the local needs of those communities. Channel 51 also argues that grant of Fox's San Diego application would harm American independent UHF stations in several ways. In response, Fox maintains that, contrary to the arguments of the petitioners, stations XETV and XHNUL-TV do provide issue-responsive programming. Fox further argues that the petitioners are attempting to get the Commission to interfere with Fox's network affiliation agreements, contrary to Commission policy and to the terms of the North American Free Trade Agreement. In this Memorandum Opinion and Order we examine the positions of all of the parties and determine that Fox's applications to transmit live programming to XETV, XHNUL-TV, and XHRTA-TV should be granted.

I. BACKGROUND

4. To make a determination on the facts of this case, we must examine the fit between each of the following: (1) Sections 325 and Sections 309 of the Communications Act of 1934 which govern the export of domestic programming and the public interest analysis applied thereto; (2) the North American Free Trade Agreement, which became effective in January 1994, and which aims to eliminate unnecessary barriers to transborder trade; and (3) a line of cases from the 1950's and 1970's embodying the Commission's pre-NAFTA consideration of arguments similar to those raised in the present case.

5. **Sections 325 and 309 of the Communications Act.** Section 325(c) requires applicants to obtain a permit prior to electronically transmitting program material from the United States to a foreign broadcast station that can be received consistently in the United States. 47 U.S.C. § 325(c). This requirement (formerly embodied in Section 325(b) of the Communications Act of 1934 and Section 28(a) of the Radio Act of 1927) was intended primarily to address two problems: objectionable programming and harmful interference by foreign stations. With regard to programming, Congress sought to stop U.S. broadcasters from using foreign broadcast stations to transmit objectionable programming into the United States in contravention of American laws. See S. Rep. No. 319, 73d Cong., 2d Sess. 1 (1934). For example, Congress stated "Certain persons who have been forbidden to operate broadcasting stations in the United States have set up stations in Mexico and are operating studios on the American side of the line. This bill will give the Commission power to stop such outlaw broadcasting." Id. With respect to interference, Congress viewed Section 325 as a way to reduce severe electrical

interference that U.S. stations were receiving from Mexican border stations. See Remote Control Border Stations: Hearings on H.R. 7800 Before the Committee on Merchant Marine, Radio, and Fisheries, 73d Cong., 2d Sess (1934). Section 325 gave the interfering stations an incentive to resolve this problem, because they would otherwise be unable to receive the benefit of American programming services. As with domestic broadcast applications, the standard for grant or denial of a Section 325 permit is one of the public interest, convenience, and necessity, as provided in Section 309 of the Communications Act. See 47 U.S.C. §§ 309(a) and 325(d).

6. The requirements of Section 325(c) have been construed to be applicable only to programming that is transmitted electronically from the United States to a foreign country and back again. Physical program delivery (known as "bicycling") generally falls outside the scope of Section 325. See, e.g., Baker v. U.S., 93 F.2d 332 (5th Cir. 1937), cert. denied, 303 U.S. 642 (1938); Media Productions, 48 R.R. 2d 160 (1980). To date, Fox programming has been bicycled to the Mexican stations at issue. In the case of XETV, for example, Fox sends programming to Bay City via satellite. Bay City downloads the programming at a satellite earth station in San Diego, records those signals onto videotape, and delivers the videotapes by truck to Tijuana for delayed broadcast on XETV.[2] Under Fox's present applications, this physical delivery to Mexican stations would continue for the majority of Fox's programs. Fox seeks Section 325 authority only for live, time-sensitive programs which could be less effective if broadcast on a time-delayed basis.

7. Due to the time-sensitive nature of the NFL broadcasts, and the reality that this Commission would not be able to resolve the issues herein before the start of the NFL season, the Mass Media Bureau and Commission granted Fox special temporary authority (STA) to transmit NFL games to Mexico for limited periods of time. See Letter, DA 94-887, 9 FCC Rcd ____ (MMB August 11, 1994), aff'd and extended Letter, FCC 94-246, 9 FCC Rcd ___ (released October 6, 1994). The most recent STA expired on October 24, 1994, and Fox requested a further extension. In the current decision, we dismiss that request as moot and consider instead whether Fox should be permitted to transmit the NFL football games as well as other live sports, entertainment, news, and public affairs programs on a more permanent basis.

8. **North American Free Trade Agreement.** The most recent and authoritative pronouncement of standards for Section 325 applications is the North American Free Trade Agreement ("NAFTA"). NAFTA is an international treaty designed to eliminate barriers to trade and to promote conditions of fair competition between Canada, Mexico, and the United States. See North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., Chap. 1, Art. 102, H.R. Treaty Doc. No. 159, 103d Cong., 1st Sess. (1993)

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[2] On occasion, we also have permitted electronic transmission of limited amounts of live programming to XETV pursuant to special temporary authority. Examples of these programs include the Tournament of Roses parade, a New Year's Eve special, and several charitable telethons, all of which were approved in unpublished staff letter decisions.

(NAFTA). Congress ratified NAFTA in December 1993, and it became effective in January 1994. See North American Free Trade Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

9. There is a specific NAFTA provision applicable to the FCC's handling of foreign programming applications under Section 325. That provision, which is reproduced in full as an Appendix to this decision, states in relevant part:

> The Federal Communications Commission (FCC) will not consider the nationality of the affected stations for the purpose of favoring a U.S. station that is competing with a Mexican station for affiliation with a U.S. programmer. Rather the FCC will apply the criteria for the grant of such a permit in the same manner as would be applied to a domestic broadcast station application under section 309 of the [Communications] Act. . . . In assessing the public interest, convenience and necessity required by the Act for the grant of authorization under section 325, the primary criterion will be avoiding the creation or maintenance of electrical interference to U.S. broadcast stations that violates applicable treaty provisions. In evaluating this and any other criterion permitted under section 309, the United States will ensure that the section 325 process is not conducted in a manner that would constitute an unnecessary restriction on trade.

NAFTA, Annex VI (emphasis added).

10. The Commission, in analyzing the effect of this language on post-NAFTA Section 325 cases, consulted with the Office of the United States Trade Representative ("USTR"), which is responsible for international trade policy, and which was one of the agencies which negotiated NAFTA. See Letter from Roderick K. Porter, Deputy Bureau Chief, International Bureau, FCC to Ira Shapiro, General Counsel, USTR (Oct. 19, 1994) (on file with FCC International Bureau). The USTR responded that NAFTA affects the FCC's administration of Section 325 proceedings, that the above-cited language was negotiated at the request of the government of Mexico which was concerned about possible discriminatory application of Section 325 requirements, and that the FCC's primary public interest consideration in post-NAFTA cases should be the avoidance of electrical interference to U.S. broadcast stations. Letter from Ira Shapiro, General Counsel, USTR to Roderick K. Porter, Deputy Bureau Chief, International Bureau, FCC (Oct. 25, 1994) (on file with FCC International Bureau) (USTR Letter).

11. **Pre-NAFTA Case Law.** Also central to the arguments of the parties are several 20- to 40-year-old cases in which the Commission considered similar arguments to those

raised herein.[3] The parties disagree on whether these cases continue to have precedential value after NAFTA. The cases at issue involved Section 325 applications in which the American Broadcasting Company ("ABC") sought authority to transmit programming to one of the same Mexican stations that Fox now seeks to serve.

12. The Commission, in the mid-1950's, granted ABC's application to transmit programming to XETV, which was then an ABC affiliate. American Broadcasting-Paramount Theatres, Inc., 21 FCC 624 (1956). In that case, American competitors argued that XETV's programming did not comply with various standards applicable to American broadcasters. However, the Commission would not consider any such programming issues because it believed that to do so would infringe on the rights of the Mexican government to set and enforce its own laws for Mexican broadcast stations. Id. at 648. The FCC also noted that no domestic station was available at that time to serve as ABC's San Diego affiliate.

13. A United States Court of Appeals reversed the FCC's decision. Wrather Alvarez Broadcasting, Inc. v. FCC, 248 F.2d 646 (D.C. Cir. 1958) (Wrather Alvarez). The court, while agreeing that Mexican broadcast stations are not subject to American laws, found that the Commission erred in totally refusing to consider programming. As the Court stated:

> While the Commission has no power to prevent XETV from broadcasting to San Diego locally originated programs which are objectionable by American standards, it has the power to refrain from issuing a permit which would give those programs a larger American audience. We do not suggest that such programming imperfections as would militate against an American station in a comparative proceeding are necessarily relevant in deciding whether a foreign station is to be permitted to affiliate with an American network. We hold only that the Commission cannot altogether exclude from consideration such serious defects of the foreign station's programming as would affect the public interest.

Wrather Alvarez, 248 F.2d at 651.

14. The Commission, on remand, considered XETV's programming and approved ABC's application to transmit programming to XETV. Despite findings that XETV at that time carried lottery information, long commercials, and very limited informational programming addressing local issues (all of which the Commission indicated would raise

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[3] American Broadcasting-Paramount Theatres, Inc., 21 FCC 624 (1956) (granting Section 325 authority to serve XETV), reversed and remanded sub nom. Wrather Alvarez Broadcasting, Inc. v. FCC, 248 F.2d 646 (1957), original decision upheld on remand American Broadcasting-Paramount Theatres, Inc., 24 FCC 296 (1958); American Broadcasting Companies, 35 FCC 2d 1, aff'd per curiam, D.C. Cir. December 27, 1972 [26 R.R. 2d 203], cert. den., 412 U.S. 939 (1973).

concerns in a domestic licensing proceeding) the Commission found that grant of Section 325 authority would nevertheless serve the public interest. American Broadcasting-Paramount Theatres, Inc., 24 FCC 296 (1958). Sixteen years later, however, the Commission determined that it would not renew ABC's Section 325 permit. American Broadcasting Companies, 35 FCC 2d 1, aff'd per curiam, (D.C. Cir. December 27, 1972) [26 R.R. 2d 203], cert. den., 412 U.S. 939 (1973). The Commission's determination in 1972 was based primarily on the new availability of an American station willing and able to serve as ABC's San Diego affiliate. American Broadcasting Companies, 35 FCC 2d at 12. The Commission found it preferable for the new American station to serve as ABC's affiliate because the Mexican station aired little to no programming meeting the local needs and interests of San Diego residents. The Commission still requires American broadcasters to determine which issues and problems are of concern to the local community and to air informational programming that the broadcaster believes to be responsive to those issues. The Mexican government does not have such a requirement for Mexican stations.[4]

II. POSITIONS OF THE PARTIES

A. The San Diego Application (Station XETV)

15. **Channel 51.** According to Channel 51, Fox's proposal to supply live programming to Mexican station XETV for retransmission into the San Diego market is contrary to the public interest. Channel 51's position is based on the Commission's denial of ABC's similar application in 1972. American Broadcasting Companies, Inc., 35 FCC 2d 1 (1972). As described in paragraph 14 above, one of the reasons for that denial was a finding that XETV's informational programming at that time was deficient. According to Channel 51, XETV's service to San Diego remains deficient to this day. Channel 51 studied XETV's program listings for a two week period in April 1994. It found that the station had no news programs and no regularly scheduled issues-oriented programs. Channel 51 monitored a few segments of XETV's one local program, Tijuana: Window to the South, and found the program to cover topics such as Mexican cooking rather than issues of public importance. Channel 51 believes that XETV has not provided information to the community about such recent events as the San Diego floods and fires, the California earthquakes, and the assassination in Tijuana of a candidate for the Mexican presidency. On the basis of newspaper articles, Channel 51 argues that XETV has no intention of broadcasting news because such programming is too expensive.

16. Channel 51 states that it does not seek comparative consideration of itself with XETV. It does, however, indicate a willingness to serve as the San Diego affiliate of the Fox network for the programming at issue should we deny Fox's application to transmit

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[4] However, according to the Mexican Ministry of Communications and Transportation (which is the Mexican equivalent to the FCC) the Mexican government supplies Mexican broadcasters with programming relating to such topics as health, tourism, and internal affairs. Since 1968 Mexican broadcasters have been required to devote 12.5% of their air time to such government-supplied programming.

that programming to XETV. Channel 51 believes that the public interest would be better served by such an arrangement because, unlike XETV, Channel 51 airs news and public affairs programming regularly. Channel 51 further argues that the Commission should deny Fox's application because a grant of that application would adversely affect the ability of UHF television stations such as itself to compete with VHF stations, and to broadcast in the future in an Advanced Television (ATV) format.

17. Channel 51 views its arguments as consistent with NAFTA because NAFTA provides for a public interest analysis pursuant to Section 309 of the Communications Act. Channel 51 argues that, pursuant to Section 309, the presentation of issue-responsive programming is a public interest factor that the Commission applies to U.S. licensees in domestic license renewal proceedings, and that the Commission must, therefore, consider this factor in foreign programming cases as well.

18. **Fox/Bay City.** Fox maintains that Channel 51's Petition, although cloaked in public interest terms, seeks to have this Commission favor a U.S. broadcaster over a Mexican broadcaster in contravention of NAFTA. Fox argues that the 22-year-old ABC case on which Channel 51 relies [American Broadcasting Companies, 35 FCC 2d 1 (1972)] concerns network affiliation and has no precedential value in light of limits which NAFTA places on FCC consideration of such matters. Further, Fox argues that the programming allegations raised against XETV in the current proceeding would not be serious enough to result in denial of a domestic station's license, were those same facts raised in a domestic licensing proceeding.

19. Bay City, which procures programming for XETV from Fox and other sources, concedes that XETV does not present news but states that this is due in part to the remote location of the station's Tijuana studio. Bay City states that one of the objectives of Fox's current Section 325 application is to permit XETV to transmit live news and/or public affairs programming as offered by Fox. According to Bay City, it tried to supply local news to XETV in 1985, but withdrew its request for Section 325 authority for such transmissions after several San Diego stations, including Channel 51, filed Petitions to Deny. Cf. Letter to Secretary, FCC from Haley, Bader and Potts, Counsel to Bay City, (February 21, 1986) (requesting dismissal of application BFP-851219AG).

20. Bay City contests Channel 51's characterization of XETV's issue-responsive programming as virtually non-existent. Bay City states that over the past three years, XETV aired 16 telethons for charitable organizations, encompassing 73 hours of broadcast time.[5] As for Window to the South, which Channel 51 characterizes as a cooking show, Bay City argues that this English language program provides XETV's American viewers with a wide range of information on Mexican culture. Bay City provides a list of topics covered on the show, all of which relate to tourism. XETV also broadcasts the annual

[5] Many of these telethons originated in the United States and were transmitted to XETV pursuant to special temporary authority issued by this Commission's Mass Media Bureau under Sections 325 and 309(c)(2)(F) of the Communications Act.

address of the President of Mexico and the State of the Union Address of the President of the United States. Bay City states that in the period January 1, 1993 through April 14, 1994, XETV broadcast a total of 7,905 public service announcements, the majority of which related to San Diego events and organizations. Bay City also states that XETV broadcasts religious programming from 7:30 a.m. through noon on Sundays.[6]

21. Finally, Bay City maintains that XETV, while not required to do so by the laws of Mexico, voluntarily complies with Commission policies limiting the commercial content of children's programs, and prohibiting the advertisement of tobacco and hard alcoholic products. It states that consistent with our policies on Children's Television Programming, XETV presents educational programs such as Where in the World is Carmen San Diego.

B. The Laredo Application (Station XHNUL-TV)

22. **Century Development.** Century, in contesting Fox's Laredo application, raises programming arguments that are similar to those discussed above with respect to the San Diego market. According to Century, Mexican station XHNUL-TV is not currently in full operation. Century alleges that, during the hours in which the station does operate, it presents no public affairs, informational, religious, or children's educational programming. It argues that although XHNUL-TV presents two news programs, one is not locally oriented and the other is merely a retransmission of another station's news. Century states that it would be willing to carry Fox's NFL programming if the Commission denies Fox's application to transmit the programs to Mexico. It also argues that NAFTA is irrelevant to the Laredo proceeding because the issue involved is not XHNUL-TV's Mexican nationality but rather the insufficiency of that station's informational programming.

23. **Fox.** Fox does not believe that the Commission should consider a foreign station's overall programming in Section 325 cases. Nevertheless, Fox argues that if the Commission does consider programming issues it should take into account that XHNUL-TV is a new station and thus has no demonstrable past program performance. According to Fox, XHNUL's programming is comparable to that of many start-up stations in the United States and this is the appropriate standard upon which the station's programming should be judged. Fox states that the station currently has two informational programs.

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[6] Bay City also argues that several of Fox's entertainment programs could be considered issue-responsive including the comedy South Central because it is "minority oriented," and the police program America's Most Wanted because it resulted in the apprehension of a suspect in San Diego County. However, the Commission generally does not consider entertainment programming in evaluating whether a licensee has met the issue-responsive programming requirement, which must be satisfied via the presentation of informational programming. See RadiOhio, Inc., 38 FCC2d 721, 741 (1973), aff'd Columbus Broadcasting Coalition v. FCC, 505 F.2d 320 (D.C. Cir. 1974) (U.S. station's performance evaluated on the basis of its coverage of community problems in informational programming. Appeal of station's entertainment programs to the community should not be considered in that context). See also Office of Communications of United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983).

The first, Eco News, is a daily one hour program that provides 20-minutes of domestic and international news reports and 40-minutes of news magazine coverage of subjects such as sports, theater, finance, the arts, culture, and public affairs. Fox also states that XHNUL broadcasts a half hour local news program entitled VIA 11 each evening from Monday through Friday.

C. The Brownsville Application (Station XHRTA-TV)

24. No party opposes Fox's request to transmit programming to Station XHRTA-TV, which is received in the Brownsville, Texas market. While we do not have detailed information about XHRTA's programming practices, we do note that we have received no complaints about those practices or concerning any other aspect of the station's operations. Fox argues that grant of this application would serve the public interest by making additional programming choices available to American audiences in the Brownsville market.

III. DISCUSSION

25. Nothing in our rules requires an American programmer to affiliate with an American station rather than a foreign station. McKinnon Broadcasting Co., 7 FCC Rcd 7554 (1992) (denial of rule making request); See also NAFTA, Annex VI. Nor is there any requirement that a foreign station receiving U.S. programming offer service better than or equal to that which could be provided by a U.S. station. See Wrather-Alvarez Broadcasting, Inc. v. FCC, 248 F.2d 646, 651 (D.C. Cir. 1957) (comparative consideration not required). Pursuant to NAFTA and Sections 309 and 325 of the Communications Act, the issue to be decided in our consideration of a Section 325 application is much more basic: Whether grant of the application would, on the whole, serve the public interest, convenience, and necessity? See 47 U.S.C. §§ 309 and 325(d).

26. NAFTA expressly provides that the primary public interest factor to be considered in a Section 325 case is the avoidance of electrical interference to U.S. broadcast stations in violation of applicable treaties. NAFTA, Annex VI. The Office of the U.S. Trade Representative recently confirmed to us that the issue of interference is to be the Commission's primary concern in assessing the public interest, convenience, and necessity in Section 325 cases. USTR Letter at 1. The FCC has received no complaints that any of the Mexican broadcasters that would receive Fox programming under the present applications cause interference to U.S. stations in violation of applicable treaties. Accordingly, that factor weighs in favor of granting Fox's applications. The primary dispute among the parties is whether, in light of NAFTA, the Commission should also examine the Mexican stations' programming and, if so, whether alleged defects in their issue-responsive programming require a finding that grant of Fox's applications would disserve the public interest.

27. **Post-NAFTA Consideration of Issues Other Than Interference.** NAFTA does not require the Commission to grant or deny any particular Section 325 application. Nor

does it identify any specific issue, other than interference, which explicitly is or is not relevant in post-NAFTA Section 325 cases. Rather, NAFTA allows the Commission to consider issues other than interference, pursuant to the broad public interest language in Section 309 of the Communications Act, but limits such consideration in a number of ways. NAFTA, Annex VI. For example, the Commission cannot consider an issue in a manner that would unnecessarily restrict trade. Id. Nor can the Commission use the Section 325 process to favor a domestic station over a foreign station for network affiliation purposes. Id. Further, the Commission cannot apply any particular criterion to a foreign station in a manner more restrictive than would be applied to a domestic station. Id.

28. Channel 51 and Century, on the basis of pre-NAFTA case law, believe that the Commission must conduct Section 325 proceedings exactly like domestic broadcast proceedings, with all of the public interest factors considered in one applied equivalently in the other. The Commission at one time shared the view that we should apply all of the public interest criteria used in domestic proceedings to Section 325 proceedings. American Broadcasting Companies, 35 FCC 2d 1 at 7-8 (1972). We believe, however, that in light of NAFTA, that conclusion is no longer valid.[7]

29. In reconciling their position with NAFTA, the petitioners focus on one sentence of the treaty which reads: "Rather [than using nationality to favor a U.S. station] the FCC will apply the criteria for the grant of such a [Section 325] permit in the same manner as would be applied to a domestic broadcast station application under Section 309 of the [Communications] Act." NAFTA, Annex VI. Petitioners read this language to require that the FCC must adopt Section 325 public interest criteria which are identical to domestic public interest criteria. We believe, however, that the petitioners misinterpret the treaty. NAFTA simply provides for the application of public interest criteria for the grant of Section 325 permits "in the same manner as would be applied to a domestic broadcast station." NAFTA, Annex VI; See also USTR Letter, at 1. This does not mean that all criteria applicable in domestic licensing proceedings are also relevant to foreign stations receiving programming pursuant to Section 325. It only means that, if a particular domestic criterion is relevant in a Section 325 context, then we must not be more restrictive in applying that criterion to a foreign station than we would be in applying it to a similarly situated American station. See generally NAFTA, Section 12, Article 1202(1). For example, in considering the issue of electrical interference, which NAFTA clearly finds relevant to Mexican stations, the Commission could not in the absence of a treaty establishing different interference standards for border stations, hold a Mexican station to a higher interference standard than that which would apply to a domestic station.

30. Were we to accept the petitioners' position that NAFTA requires that all domestic

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[7] The Commission may implement a changed view of the public interest as long as that view is based on consideration of permissible factors and is reasonable. WNCN Listener's Guild, 450 U.S. 582 (1981) citing FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 793 (1978).

public interest criteria be applied to foreign stations, we would reach results that are incompatible with the goals of NAFTA. For example, U.S. citizenship of a station licensee is an important public interest factor in domestic license proceedings. However, applying that criteria to foreign stations would be antithetical, preventing virtually all foreign stations from receiving American programming. Thus, applying such a criterion in a Section 325 context would likely be a restriction on trade, a result which NAFTA seeks to prevent.[8] It could be a similarly inappropriate barrier to trade to apply all American recordkeeping requirements to foreign stations. For example, even though the completeness of a domestic station's public inspection file is considered in virtually every U.S. broadcast renewal proceeding, this requirement has little public interest bearing in a foreign programming context.

31. NAFTA was not intended as a means by which the United States would export all of its broadcast laws to foreign sovereign nations. Rather, it was intended to open our borders to free competition and trade, in part by eliminating any Section 325 practices that this Commission deems no longer necessary to serve the public interest in the context of foreign programming applications. To further this goal, NAFTA established one primary and objective criterion (interference) to be applied to all Section 325 cases, without closing off the potential for the Commission also to consider similarly serious public interest issues that might arise on a case-by-case basis. Accordingly, we conclude that while there is certainly some overlap in the public interest issues that are relevant in domestic and Section 325 cases after NAFTA, interference being one such area of overlap, public interest issues in Section 325 and domestic licensing proceedings need not be identical.

32. **Programming Considerations After NAFTA.** As discussed above, the free trade goals of NAFTA require that the Commission refrain from restricting the cross-border flow of programming, unless that restriction is necessary to protect the public interest, convenience, and necessity. We must therefore determine whether and to what extent our consideration of a foreign station's programming in Section 325 cases is currently necessary.

33. In making that determination, the original intent of Congress is especially relevant. Congress, in creating Section 325 and in applying Section 309 public interest criteria to Section 325 cases, sought to protect American audiences from substantial domestic harm that could be caused by certain activities of foreign stations. With respect to programming, Congress focussed primarily on preventing "Dr. Brinkley" type programming. Brinkley, after losing his U.S. broadcast license, used a Mexican station to broadcast over-the-air prescriptions for medical problems into the United States in a manner found inimical to public health and safety. See Remote Control Border Stations: Hearings on H.R. 7800 Before the Committee on Merchant Marine, Radio, and Fisheries, 73d Cong., 2d Sess (1934) (Hearings on H.R. 7800). See also, American Broadcasting

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[8] Compare with SIN, Inc., 101 FCC 2d 823 (1985) (eliminating Section 310 U.S. citizenship requirements for Section 325 applicants while retaining possible consideration pursuant to Section 309).

Companies, Inc., 35 FCC 2d 1, 5 n.10 (1972). Congress also expressed concern about programs that are not "suitable for broadcasting" and that are "obnoxious or offensive in violation of the laws of our country." Hearings on H.R. 7800 at 4 and 30. We believe that the consideration of similar programming concerns continues to be a permissible restraint on trade in post-NAFTA Section 325 cases because otherwise there could be a substantial risk of serious harm to American audiences.

34. Accordingly, we believe that it is still appropriate for us to consider programming matters in a post-NAFTA public interest analysis of Section 325 cases if the programming at issue would cause a substantial risk of public harm. We base that standard on NAFTA's requirement that restrictions on trade be no broader than necessary and on our desire to be faithful to the original intent of Congress in adopting Section 325. We also note that our standard is consistent with the concerns expressed by the Wrather-Alvarez court that the Commission not ignore "such serious defects of the foreign station's programming as would affect the public interest." Wrather-Alvarez Broadcasting, Inc. v. FCC, 248 F.2d 646, 651 (D.C. Cir. 1957). We further note, however, that this post-NAFTA foreign programming standard does not encompass every programming issue that the Commission might apply to domestic broadcast stations.

35. Programming raising public interest concerns under our post-NAFTA standard might include, for example, programming that is obscene, indecent, illegal, encourages use of harmful products or activities, or is otherwise inimical to public health and safety. The types of programming allegations raised in the present proceeding, while potentially important with respect to a domestic station, would not generally create a substantial risk of public harm in the case of a foreign station. In making this determination, we note that Channel 51 argues that XETV's lack of broadcast information on such matters as nearby earthquakes and floods could affect public safety in San Diego. However, given that the San Diego market has a significant number of American broadcast stations able to provide the public with such information, and that Mexican stations are not San Diego's primary source of information, we would not find a Mexican station's failure to carry additional flood and earthquake information into that market sufficient to support denial of a Section 325 permit.[9] Accordingly, we do not find XETV's issue-responsive programming to raise concerns under our post-NAFTA standard for foreign programming.

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[9] There are six American television stations in the San Diego ADI. R.R. Bowker, Broadcasting & Cable Yearbook, (1994 ed.) at C-185 ("Broadcasting Yearbook"). There are 36 American radio stations in the San Diego Metro Market. BIA Publications, Inc., BIA's Radio Yearbook (formerly Duncan's Radio Yearbook), (1994 ed.) at 272-75 ("BIA Yearbook"). While the public harm argument is not raised with respect to the Laredo and Brownsville proceedings, we note that those areas also are reached by significant American stations. The McAllen-Brownsville ADI is served by six American television stations and there are 22 American radio stations in the McAllen-Brownsville-Harlingen metro market. Broadcasting Yearbook at C-166; BIA Yearbook at 179. With respect to Laredo there are three American television stations in the ADI. Broadcasting Yearbook at C-161. Laredo is not in a metro market, but there are at least eight American radio stations licensed to Laredo itself. Broadcasting Yearbook at B-365-66.

36. We recognize that our conclusion in the present case is different from that which we reached in 1972, when we considered somewhat similar allegations. See American Broadcasting Companies, 35 FCC 2d 1 (1972). Our 1972 decision, however, was based largely on the availability of an American broadcaster willing to take the place of a foreign station for purposes of network affiliation. American Broadcasting Companies, 35 FCC 2d 1 (1972). Twenty-two years later, NAFTA specifically states that the Commission may not use Section 325 as a means of favoring a domestic station that is competing with a foreign station for affiliation with a U.S. programmer. NAFTA, Annex VI. Thus, the Commission may not in the present case properly consider Channel 51 or Century's willingness to affiliate with Fox as a factor bearing on the public interest. Without that network affiliation factor, to which the 1972 Commission accorded substantial weight in its denial of the ABC permit, the alleged deficiencies in the Mexican stations' programming, even if true, would not be sufficient to outweigh the public interest of making additional programming choices available to American audiences via stations that are not interfering with the stations that provide existing choices. See American Broadcasting-Paramount Theatres, Inc., 24 FCC 296 (1958).

37. Further, it is not clear to us that the Mexican stations' programming is indeed deficient even under the standards currently applied to American broadcasters. American broadcasters have broad discretion over the selection of issue-responsive programming. See Office of Communications of United Church of Christ v. FCC, 707 F.2d 1413, 1431 (D.C. Cir. 1983). Many different types of programming can satisfy a domestic licensee's obligation, including programming that is not locally produced. According to information supplied by Bay City, XETV's current programming includes regular religious programs, public service announcements, and other programs that may qualify as issue-responsive. See Commercial Television Stations, 98 FCC 2d 1076, 1087 (1984).[10] Station XHNUL-TV's informational programming offerings appear to be much smaller, but we recognize that the station is just beginning its operations. The Commission, in licensing new domestic stations, does not require the licensee to demonstrate past program performance but rather to provide a brief description of their intentions for future service. See Application for Construction Permit for Commercial Broadcast Station, FCC Form 301, Section IV-A (Aug. 1992). Accordingly, it would be inappropriate to hold XHNUL-TV to the standards applied to American stations at the time of license renewal, even were we to find such standards applicable to Section 325 cases in general. With respect to the final station, XHRTA-TV, there are no allegations that the station's programming is deficient in any way.

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[10] Additionally, Channel 51 bases its programming allegations primarily on television schedules as printed in a local newspaper and newspaper articles discussing a lack of news on XETV. Such sources do not reflect personal knowledge of a party, are often less than accurate, and thus would not ordinarily be sufficient to make the required showing in a domestic licensing proceeding. See News International, PLC, 97 FCC 2d 349, 358 (1984)(Newspaper reports generally insufficient to make a prima facie case). The remaining allegations that are based on personal knowledge (e.g., the content of one particular program) and the fact that XETV's programming was found deficient 20 years ago are insufficient to call the station's current programming into question.

38. **Additional Considerations.** Channel 51 raises two additional arguments against the grant of the San Diego application. First, Channel 51 states that grant of the application will hinder the ability of UHF stations like itself to compete with VHF stations. Second, Channel 51 argues that a grant of Fox's application would make it harder for independent stations to obtain programming in an advanced television (ATV) format because such programming is most likely to be produced by the networks. We do not believe that either of these arguments has merit.

39. With respect to Commission protection of UHF stations, we eliminated the UHF Impact Policy in 1988. Policies Regarding Detrimental Effects of Proposed New Stations on Existing Stations, 3 FCC Rcd 638 (1988). Under that policy, adopted during UHF's infancy, it was at one time contrary to the public interest to improve domestic VHF service if that service would have an adverse economic impact on a UHF station. In 1972, the Commission applied the UHF policy in a foreign programming context. American Broadcasting Companies, 35 FCC 2d 1 (1972). By 1988, however, the Commission found that the development of UHF television had reached a point where there was no longer a public interest need to restrict competition to UHF stations by VHF stations. Policies Regarding Detrimental Effects of Proposed New Stations on Existing Stations, 3 FCC Rcd 638, 642 (1988). That conclusion seems particularly applicable in the current case, given that 80% of San Diego television households subscribe to cable[11] and Channel 51's signal appears as Channel 9 or Channel 2 on local cable systems. Further, a Commission decision favoring American stations due to such an economic competitive factor might well constitute an unnecessary restriction on trade, prohibited by NAFTA. Channel 51's argument concerning Advanced Television seeks to have the Commission favor an American broadcaster over a foreign station for the purpose of affiliation with a U.S. programmer, and therefore is also inconsistent with NAFTA.

IV. CONCLUSION

40. In sum, we find that in post-NAFTA Section 325 cases, the primary factor to be considered is the avoidance of electrical interference to U.S. broadcast stations. Other activities of a Mexican station will also be considered pursuant to Section 309 of the Communications Act. A Mexican station's programming is relevant to a Section 309 public interest analysis if the programming poses a substantial risk of public harm.

41. Grant of the instant applications would enable stations XETV, XHNUL-TV, and XHRTA-TV to provide over one million U.S. television homes along the Mexican/U.S. border with additional live programming choices, which may well include improved news and public affairs programs. The signals of these Mexican stations have not been shown to cause electrical interference to U.S. stations – the primary factor that would outweigh this benefit. Neither has the stations' programming been found to create a substantial risk of public harm, and no other issue raises any additional public interest

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[11] Warren Publishing, Cable and Television Factbook, (1994 ed.) at I-23.

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[11] Warren Publishing, Cable and Television Factbook, (1994 ed.) at I-23.

concerns. Therefore, we find that the public interest would be served by granting Fox's applications.

V. ORDERING CLAUSES

42. Accordingly IT IS ORDERED that the separate Petitions to Deny filed by Channel 51 of San Diego, Inc. and Century Development Corporation ARE DENIED.

43. IT IS FURTHER ORDERED that the above-referenced applications of Fox Television Stations for Section 325(c) authority to transmit program material to Mexican stations XETV, Tijuana; XHNUL-TV, Nuevo Laredo; and XHRTA-TV, Reynosa-Matamoros ARE GRANTED for a period of five years to begin on the date of adoption of this Memorandum Opinion and Order, and conditioned upon continued adherence to treaty provisions concerning the avoidance of electrical interference to U.S. stations.

44. IT IS FURTHER ORDERED that the October 1994 Request of Fox Television Stations for Extension of Special Temporary Authority to transmit programming to Mexican broadcast stations IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Annex VI
Schedule of United States

Sector:	Communications
Sub-Sector:	Broadcasting
Industry Classification:	CPC 7524 Program Transmission Services
Level of Government:	Federal
Measures:	*Communications Act of 1934*, 47 U.S.C. §§ 309, 325
Description:	The United States will ensure that in considering applications for a grant of authority to transmit programming to foreign stations for retransmission into the United States under section 325 of the *Communications Act of 1934* ("the Act"), the Federal Communications Commission (FCC) will not consider the nationality of the affected stations for the purpose of favoring a U.S. station that is competing with a Mexican station for affiliation with a U.S. programmer. Rather, the FCC will apply the criteria for the grant of such a permit in the same manner as they would be applied to a domestic broadcast station application under section 309 of the Act. In addition, the term of the section 325 permit shall be extended from one year to five years in all situations where it can be assured that the retransmitting station is and will be in full compliance with applicable treaties. In assessing the public interest, convenience and necessity required by the Act for the grant of authorization under section 325, the primary criterion will be avoiding the creation or maintenance of electrical interference to U.S. broadcast stations that violates applicable treaty provisions. In evaluating this and any other criterion permitted under section 309, the United States will ensure that the section 325 process is not conducted in a manner that would constitute an unnecessary restriction on trade.

PUBLIC NOTICE

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DA 95-66

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NYNEX'S MOTION FOR EXTENSION OF ITS TECHNICAL TRIAL OF VIDEO DIALTONE SERVICE

FILE NO. W-P-C-6836

Released: January 18, 1995

On January 11, 1995, the New York Telephone Company (NYNEX) filed a motion for a one year extension of its Section 214 authorization to construct, operate, own, and maintain a fiber optic network to test the provision of video dialtone service in portions of New York City. The Commission initially granted NYNEX authorization to conduct a limited trial in its Manhattan service area until January 14, 1995. (See Application of New York Telephone Company, W-P-C-6836, Order and Authorization, 8 FCC Rcd 4325 (1993). NYNEX seeks an additional year to continue its technical trial.

NYNEX states that it planned to use both analog and digital technology for its video dialtone trial, but the digital phase of the trial has been postponed due to delays in the availability of interoperable digital equipment. NYNEX anticipates digital technology will be available for deployment in the third Quarter of 1995. NYNEX states that the introduction of digital technology will provide a critically important test of the design of current and future video dialtone architectures, and the extension will provide an opportunity to develop actual operating experience.

Interested parties are invited to file comments or reply comments on the motion. Comments should be filed by **February 7, 1995**, and reply comments should be filed by **February 17, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Three copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the motion can be obtained from ITS at (202) 857-3800. The motion is available for review and photocopying at the FCC Public Reference Room, 6th Floor, 2025 M Street, N.W., Washington, D.C., from 8:30-12:30 and 1:30-3:00, Monday through Thursday.

We will continue to treat this proceeding as non-restricted for purposes of the Commission's ex parte rules. See generally 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

- FCC -

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DA 95-428

TARIFF FILING REQUIREMENTS FOR NONDOMINANT COMMON CARRIERS

Released: March 6, 1995

On January 20, 1995, the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's order, Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993), permitting domestic nondominant common carriers to file a range of rates in their tariffs. Southwestern Bell Corp. v. FCC, Nos. 93-1562, 93-1568, 93-1590, and 93-1624 (D.C. Cir. Jan. 20, 1995). In light of the court's decision, effective upon issuance of the court's mandate, domestic nondominant common carriers previously permitted by the Commission to file a range of rates in their tariffs must refile tariffs containing discernible rates.

Pursuant to court rules, the mandate will issue on or about March 7, 1995, unless a party petitions the court for a stay of the mandate. Until the Commission acts to revise the tariff filing requirements for nondominant carriers, the Commission does not intend to initiate independent enforcement actions against those domestic nondominant carriers affected by the court's order for failure to comply with the Commission's rules for dominant carrier tariff filings, 47 C.F.R. §§ 61.32, 61.33, 61.54, and 61.58 (1993). Pending action by the Commission, the Commission will continue to accept such tariff filings which accord with the Commission's general and specific rules regarding tariff format and notice for domestic nondominant carriers. See 47 C.F.R. §§ 61.20, 61.21, 61.22(a)-(d) except for the second sentence in 61.22(b), and 61.23 (1993).

All publications filed with the Commission by domestic nondominant carriers must be accompanied by a cover letter briefly explaining the nature of the filing and indicating the date and method of filing of the original cover letter as required below. A separate cover letter may accompany each publication or an issuing carrier may file as many publications as desired with one cover letter. If a receipt for accompanying publication is desired, the cover letter must be sent in duplicate. One copy showing the date of the receipt by the Commission will then be returned to the sender.

Tariff filings by domestic nondominant carriers should be submitted on three and one-half inch floppy diskettes, in IBM compatible form using MS DOS 5.0 and Word Perfect 5.1 software. The diskette should be submitted in "read only" mode and clearly labeled with the carrier's name, Tariff Number, and the date of submission. All such tariff filings should be accompanied by a paper cover letter as described above. The tariff must contain the carrier's name, and the information required by Section 203 of the Communications Act, 47 U.S.C. § 203. Changes to a tariff should be made by refiling the entire tariff on a new diskette, with the changed material included. The carrier must indicate in the tariff those changes that have been made.

Every proposed tariff filing by a domestic nondominant carrier must bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least one day notice. Notice is accomplished by filing the proposed tariff changes with the Commission. The notice period begins on and includes the date the tariff is received by the Commission, but does not include the effective date. In computing the notice period required, all days including Sundays and holidays must be counted.

Publications sent for filing by domestic nondominant carriers must be addressed to "Secretary, Federal Communications Commission, Washington, DC 20554." The date on which the publication is received by the Secretary of the Commission (or the Mail Room where submitted by mail) is considered the official filing date. For all tariff publications requiring fees as set forth in part 1, subpart G of Chapter 1 of the Commission's rules, issuing carriers must submit the original of the cover letter (without attachments), FCC Form 159, and the appropriate fee to the Mellon Bank, Pittsburgh, PA at the address set forth in Section 1.1105 of the Commission's rules, 47 C.F.R. § 1.1105. Domestic nondominant carriers should submit these fee materials on the same date as the submission of the tariff publications to the Secretary of the Commission.

The issuing domestic nondominant carrier using the procedures described above should also send one copy of the cover letter with one diskette containing both the complete tariff and any attachments to the following: Secretary of the Commission; Chief, Tariff Review Branch; and, the commercial contractor at its offices on Commission premises. The copy of the diskette and cover letter sent to the Chief, Tariff Review Branch should be clearly labeled as the "Public Reference Copy." The issuing carrier should file these copies so they will be received on the same date as the tariff filings submitted to the Secretary of the Commission.

For further information, contact Katherine Schroder, Tariff Division, Common Carrier Bureau, (202) 418-1530, or Frank Hopwood, Tariff Division, Common Carrier Bureau, (202) 418-1540.

- FCC -

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

DA 95-402

In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115
	)	
Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Services	)	CC Docket No. 94-46 RM 8367
	)	
Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service	)	CC Docket No. 93-116

ORDER

Adopted: March 2, 1995 **Released:** March 2, 1995

By the Acting Chief, Commercial Radio Division, Wireless Telecommunications Bureau:

1. The Mobile and Personal Communications Division of the Telecommunications Industry Association (TIA) has requested an extension of time from February 2, 1995, to March 2, 1995, to file a further Reply in the above-captioned docket. C-Two-Plus Technology, Inc. (C-Two-Plus) has filed comments on TIA's motion in which it requests that if TIA receives additional time to file a further Reply, other interested parties be given an opportunity to respond to that Reply.

2. The Commission's Report and Order in this proceeding adopted new Section 22.919 of the Rules to help reduce the fraudulent use of cellular radio equipment caused by tampering with the unique Electronic Serial Numbers (ESNs) that are used to identify customers' cellular equipment. On December 19, 1994, TIA filed a petition for reconsideration opposing the Report and Order insofar as it prohibited manufacturers' authorized service centers or representatives from transferring ESNs in connection with the normal repair and upgrade of cellular mobile equipment. TIA also requested the Commission to require cellular mobile equipment receiving type-acceptance approval after September 1995 to conform with industry authentication standards. On January 20, 1995, the Cellular Telecommunications Industry Association (CTIA) opposed TIA's request that repair centers be allowed to undertake ESN transfers. Subsequently, representatives of CTIA and TIA discussed their differences and determined that they could be resolved by adopting certain changes to Section 22.919 of the Rules that would strike a balance between their desire to prevent cellular fraud, yet meet the industry's concurrent need to undertake reasonable repair activities in controlled circumstances. On February 2, 1995, CTIA and TIA filed a "Joint Reply and Comments" (Joint Reply) in which they recommended adopting such rule changes. In addition, TIA and CTIA announced plans to hold further meetings in order to discuss additional steps,

including proposing further modifications to the Commission's Rules, that might be undertaken jointly by them to prevent cellular fraud. Nevertheless, TIA asserts, given the highly technical nature of the discussions between TIA and CTIA on these issues, it has been impossible to complete their discussions prior to the due date for responses to the opposition to TIA's petition for reconsideration. In light of the foregoing, TIA filed a motion on February 2, 1995, in which it requested another month to finish its discussions with CTIA and present relevant matters to the Commission which are responsive to the Oppositions to TIA's Petition for Reconsideration and were not fully dealt with in the Joint Reply. CTIA has not objected to TIA's request.

3. C-Two-Plus filed comments on TIA's motion for extension of time. C-Two-Plus asserts that TIA and CTIA proposed certain significant rule changes for the first time in their Joint Reply, thereby depriving other interested parties of the opportunity to comment on them. In this light, C-Two-Plus requests that if the Commission grants TIA's motion for an extension of time to file a responsive pleading, that all interested parties be afforded an opportunity to review and comment on all of the proposed changes suggested by TIA and CTIA.

4. We find that good cause has been shown for granting TIA's motion for an extension of time. Based on discussions to date between TIA and CTIA, it appears likely that providing some additional time will supplement the record of this proceeding in a productive way without causing significant delay. Further, we grant all parties to this proceeding, except for TIA and CTIA, an additional thirty days from March 2, 1995, to file comments on the proposals set forth in TIA's responsive pleading as well as those set forth in the Joint Reply filed on February 2, 1995, by TIA and CTIA. We believe that granting additional time for further discussion of and comment on the technical issues associated with the prevention of cellular fraud will enhance the Commission's consideration of these issues by presenting a more complete record. Comments on the foregoing proposals must be limited to matters raised by the responsive pleading due March 2, 1995 and those raised in the Joint Reply and Comment filed on February 2, 1995, by TIA and CTIA.

5. Accordingly, the motion for extension of time IS GRANTED and comments on the responsive pleading to be filed by The Mobile and Personal Communications Division of the Telecommunications Industry Association ARE DUE by April 3, 1995.

FEDERAL COMMUNICATIONS COMMISSION

Rosalind K. Allen
Acting Chief, Commercial Radio Division
Wireless Telecommunications Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

DA 95 - 459

In the Matter of	)	
	)	Transmittal Nos. 8155 and 8156
AT&T Communications	)	
Tariff F.C.C. No. 1	)	

ORDER

Adopted: March 10, 1995 ; Released: March 10, 1995

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On February 10, 1995, AT&T Corp. (AT&T) filed Transmittal Nos. 8155 and 8156. Transmittal No. 8155 introduced Winback Savings Promotions Nos. 1 and 2 to AT&T's long distance message telephone service, added Basic Schedule Service Promotion No. 1, and claimed price cap headroom of $351,250,000. Transmittal No. 8156 introduced Winback Savings Promotions Nos. 3 and 4 to AT&T's long distance message telephone service, added Basic Schedule Savings Promotion No. 2, and claimed price cap headroom of $223,447,000. Transmittals 8155 and 8156 are scheduled to take effect on March 27, 1995.

2. On February 27, 1995, MCI Telecommunications Corporation (MCI) filed a petition to reject, or suspend and investigate, Transmittal Nos. 8155 and 8156. AT&T replied on March 1, 1995.

3. In its petition, MCI claims that AT&T is offering four different winback offers to similarly situated customers in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), which prohibits a carrier from providing "unjust and unreasonable discrimination in charges ... for or in connection with like communications service...."[1]

4. MCI also argues that the cost support for these transmittals fails to meet the requirements of Section 61.49(d) of the Commission's rules, 47 C.F.R.

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[1] MCI Petition at 2.

§ 61.49(d). MCI asserts that AT&T's cost support is internally inconsistent[2] and that the price cap effect of the transmittal is not consistent with the cross-elastic reductions in revenue. MCI claims that, in Transmittal No. 8155, AT&T claims price cap credit of $551,250,000 but only shows lost revenue of $162,911,000 in its cost support for its below-band rates. Similarly, in Transmittal No. 8156, MCI notes that AT&T claims price cap credit of $223,447,000 but only shows cross-elastic effects of $63,586,000.

5. AT&T replies that its promotional offers do not violate Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), because they are not "like" and also because the price differences between the different offers are "reasonable."[3] AT&T states that both Transmittal Nos. 8155 and 8156 consist of a basic schedule volume discount promotion and two winback promotions, one that gives a 40 percent discount and includes operator handled calls and another that gives a 50 percent discount but excludes operator handled calls. After six months in one of the winback promotions, the customer's usage is shifted to the related basic schedule promotion and billed at those rates. AT&T argues that the exclusion of operator handled calls from each of the 50 percent discount plans makes the challenged winback tariffs apply to different categories of usage and that the winback promotions offering 40 percent and 50 percent discounts are therefore not "like." Second, AT&T argues that, even if the Commission were to decide that the services covered by the winback tariffs are "like," the price differences are reasonable because each of the offers is generally available to prospective winback customers. AT&T cites the *CIID Card Order*[4] in support of its argument.

6. AT&T further argues that the incremental net revenue test that AT&T has filed in support of its below-band filings is more than adequate to meet the requirements of Section 61.49(d) of the Commission's rules. AT&T states that the sole basis on which MCI contends that AT&T has failed to meet the requirements of Section 61.49(d) is that AT&T's incremental net revenue test is, in some respects, inconsistent with AT&T's price cap calculations. On March 2, 1995, AT&T amended its cost support to reduce its price cap headroom credit to $276,852,000 for Transmittal No. 8155 and to $160,669,000 for Transmittal No. 8156, thereby reducing its price cap headroom claims by a total of $137,176,000. AT&T further argues that there are a variety of reasons why a price cap credit calculation and the pricing effects of an incremental net revenue test may

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[2] MCI Petition to Suspend at 3, n.4. (MCI notes that AT&T's cost support quotes the wrong discount amount for two of its promotions. MCI also points out that there are gaps in the rate ranges in AT&T's original filing of Transmittal 8155).

[3] AT&T Reply at 4-5.

[4] AT&T Communications, Revisions to Tariff F.C.C. No. 1, 7 FCC Rcd 7730, at 7734 (1992) (*CIID Card Order*).

differ in any particular circumstance. AT&T states that its price cap headroom calculation is based on a repricing of its historical (calendar year 1993) base period demand, in accordance with Section 61.46 of the Commission's rules. In contrast, AT&T argues, the incremental net revenue analysis necessarily relies on the projected impact, including cross-elastic effects, of the significant rate reductions implemented in these tariff filings. Therefore, AT&T argues, differences in these amounts are not surprising and are not required to be reconciled under the rules.

7. Responding to a request from the Tariff Division, AT&T filed additional cost support for Transmittal Nos. 8155 and 8156 on February 17, 1995. In its filing, AT&T further described its demand forecast methodology.

8. In Application No. 2258 for Special Permission to waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. § 61.58 and 61.59, filed on March 2, 1995, AT&T requests special permission to amend the tariff language in Transmittal Nos. 8155 to remove Easy Reach 500 and Select Call from the Basic Schedule Savings Promotion No. 1.

9. The Tariff Division has reviewed AT&T Communications Transmittal Nos. 8155 and 8156 and the related pleadings. We conclude that the filings do not warrant suspension because they do not, on their face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

10. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. No. 1, Transmittal Nos. 8155 and 8156, filed by MCI Telecommunications Corporation, IS DENIED.

11. IT IS FURTHER ORDERED that AT&T's application No. 2258, requesting permission to advance the effective date of the above-referenced transmittals on not less than one days' notice, IS GRANTED. For this purpose, Sections 61.56, 61.58 and 61.59 of the Commission's Rules. 47 C.F.R. § § 61.56, 61.58 and 61.59, ARE WAIVED. AT&T should cite the DA number of this Order as authority.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
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DA 95-540

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON APPLICATIONS FOR REVIEW OF BELLSOUTH'S SECTION 214 AUTHORIZATION

FILE NO. W-P-C-6977

Released: March 20, 1995

On March 10, 1995, the National Cable Television Association (NCTA) and Scripps Howard Cable Company (Scripps Howard) filed applications for review of the Commission's decision authorizing BellSouth to conduct a market trial of video dialtone service. (See In the Matter of the Application of BellSouth Telecommunications, Inc., For Authority under Section 214 of the Communications Act of 1934, as amended, and Part 63 of the Commission's Rules, to construct and operate integrated network facilities for trial of video dialtone service in the City of Chamblee, Georgia, and adjacent communities in DeKalb County, Georgia, File No. W-P-C-6977, Order and Authorization, DA 95-181 (rel. Feb. 8, 1995)).

NCTA seeks Commission review of the Common Carrier Bureau's Order and Authorization, arguing that the Bureau erroneously failed to conclude that Title VI of the Communications Act of 1934, as amended, applies to BellSouth's provision of video programming on the video dialtone platform. NCTA argues that the Bureau provides no basis for its decision not to apply Title VI to BellSouth.

Scripps Howard argues that the Bureau's Order fails to establish sufficient safeguards to ensure that all video programmers will have an opportunity to obtain analog channels on the BellSouth video dialtone system. Scripps Howard also argues that it may incur substantial financial costs as a result of the construction of BellSouth's video dialtone system.

Interested parties are invited to file comments on the applications for review. Oppositions should be filed by **April 3, 1995**, and replies to the oppositions should be filed by **April 13, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Three copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W.,

Suite 140, Washington, D.C. 20037. Copies of the applications can be obtained from ITS at (202) 857-3800. The applications are available for review and photocopying at the FCC Public Reference Room, 6th Floor, 2025 M Street, N.W., Washington, D.C., from 8:30-12:30 and 1:30-3:00, Monday through Thursday.

We will continue to treat this proceeding as non-restricted for purposes of the Commission's ex parte rules. See generally 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

- FCC -

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
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DA 95-503

March 16, 1995

February 1995 Update of FCC Microwave Assignments now available on Internet

In order to further facilitate public access to Commission radio assignment information, the FCC's Office of Engineering and Technology (OET) is releasing a new extract of microwave radio assignments on frequencies above 806 MHz contained in the Commission's *Master Frequency File* (*XFS*) in the *Enhanced Microwave Environmental Link File* (*EMELF*) format

EMELF Data Base

The EMELF data set being released was extracted from the *Master Frequency File* (*XFS*) on 7 February 1995.[1] The EMELF files are available for down loading from the FCC's Anonymous FTP site (ftp.fcc.gov) in the directory "/pub/Spectrum_Management/Data/EMELF/x950702/".[2] The table below lists the files from the February extract and their sizes (un-compressed and compressed). It should be noted that the assignment data is extracted from the XFS data base by underlying data base. The division of the data between files listed below is determined by the file handing capability of the extraction software and computer hardware, and not by the underlying data base or frequency order.

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1 The Commission previously released data extracted on 1 July 1994, see *Public Notice*, DA94-1016, dated 20 September 1994. With the addition of this February 1995 data set, the July 1994 data set has been moved to the directory "/pub/Spectrum_Management/Data/EMELF/X940701/".

2 A sample data set based on the July 1994 extract is available in the directory "/pub/Spectrum_Management/Data/EMELF/Sample_Data/".

File Name	File Size (bytes)	Compressed File Size (bytes)
x950207.lst	786	—
x950207a.dat (zip)	88,185,153	5,129,801
x950207b.dat (zip)	91,159,306	3,609,989
x950207c.dat (zip)	87,630,783	1,897,005
x950207d.dat (zip)	86,843,075	1,916,498
x950207e.dat (zip)	86,625,547	1,883,233
x950207f.dat (zip)	87,103,051	1,941,216
x950207g.dat (zip)	89,009,513	3,449,845
x950207h.dat (zip)	91,010,586	5,185,183
x950207i.dat (zip)	23,057,675	1,630,162
x950207j.dat (zip)	88,856,201	6,302,524
x950207k.dat (zip)	89,218,824	6,531,099
x950207l.dat (zip)	89,218,824	6,531,099
Total:	997,919,324	46,007,654

EMELF Documentation and *DosEmelf* Program

The *EMELF* documentation along with a revised *DosEmelf* program (version 2.0)[3] and its associated documentation is available for down loading from the FCC's Anonymous FTP site (ftp.fcc.gov) in the directory "/pub/Spectrum_Management/Software/DosEmelf/".

File Name	Description	Approximate File Size (kbytes)	Approximate Compressed Size (kbytes)
Emelf02.zip	A compressed file in the ZIP format which contains the following files:		109
brun45.exe	The QuickBASIC runtime module is needed to run an executable version of DosEmelf. It must be located in the same directory as *DosEmelf.exe*, or the MS-DOS path statement must point to it.	77	

[3] The Commission previously released this program as *CnvEmelf*, version 1.0, see *Public Notice*, DA 94-1016, dated 20 September 1994.

File Name	Description	Approximate File Size (kbytes)	Approximate Compressed Size (kbytes)
DosEmelf.bas	A QuickBASIC (v4.5) program which converts EMELF data into a flat ASCII format suitable for use by the program LinkMap	63	
DosEmelf.doc	A WordPerfect v5.2 document which describes the operation of the program DosEmelf.	60	
DosEmelf.exe	The executable version.	40	
DosEmelf.ini	The initialization file containing the sub-directory location for the input, output and report files.	0.1	
EmelfStr.doc	A WordPerfect v5.2 document which describes the file structure of an Enhanced Microwave Environmental Link File (EMELF).	76	
Packing.lst	An ASCII listing of the contents of Emelf02.zip	1	
ReadMe.1st	An ASCII read me file describing the program	1	
Regstrtn.frm	Program and documentation registration form.	0.8	
UsBndFil.dat	A data file containing band assignment information which is used to determine which output file the assignment data is to be written too.	4	

Please Note:

(1) The data bases, programs, and related documentation files discussed in this *Public Notice* are available only from the FCC via Internet from the Commission's Anonymous FTP site (ftp.fcc.gov).

(2) All documentation is in WordPerfect 5.1/5.2 format.

(3) All documentation, program, and data files have been compressed in the ZIP format. The files can be un-compressed

using either the GNU public domain ZIP program[4] or the commercial PkUnZip program.[5]

For further information contact:

Donald Draper Campbell, Senior Electronics Engineer
Federal Communications Commission / Office of Engineering and Technology
Allocations and Standards Division / Spectrum Utilization and Economics Branch
2000 M Street, NW / Suite 230
Washington, DC 20554
e-mail (Internet): dcampbel@fcc.gov

— FCC —

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[4] The GNU public domain ZIP compression program can be down loaded from the anonymous ftp site, "prep.ai.mit.edu" (18.71.0.38) in the directory "pub/gnu". The executable program is "gzip-1.2.4.msdos.exe" and the associated documentation and C source code is in the file "gzip-1.2.4.shar" (ascii) or "gzip-1.2.4.tar" (tar). GZIP can compress and un-compress files in the ZIP format.

[5] PKZIP, version 2.04g, is a compression program that can be found on many computer bulletin board systems (BBS) and requires the payment of a registration fee, or it can be ordered directly from PKware, Inc. • 9025 N. Deerwood Drive • Brown Deer, WI 53223 / ☎ +1 (414) 354-8699 / Fax: +1 (414) 354-8559.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Application of	)	
	)	
U S WEST COMMUNICATIONS, INC.	)	File No. W-P-C-6868
	)	
For Authority under Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain facilities and equipment to provide video dialtone service in portions of the Omaha, Nebraska service area.	)	

ORDER AND AUTHORIZATION

Adopted: December 23, 1994 Released: January 6, 1995

By the Commission:

I. INTRODUCTION

1. On December 22, 1993, U S WEST Communications, Inc. (US West) was granted authority pursuant to Section 214 of the Communications Act of 1934, as amended,[1] to construct and operate facilities necessary to conduct a technical and market trial of video dialtone service in its Omaha, Nebraska service area.[2] Subsequently, before commencing service, US West sought clarification of certain aspects of its authorization.[3]

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[1] 47 U.S.C. § 214; see Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (Second Report and Order), aff'd & modified on recon., Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, FCC 94-269 (released Nov. 7, 1994), appeal pending sub nom. Mankato Citizens Tel. Co. v. FCC, No. 92-1404 (D.C. Cir. Sept. 9, 1992).

[2] U S WEST Communications, Inc., 9 FCC Rcd 184 (1993) (Omaha Authorization), petition for recon. pending.

[3] Letter from Lawrence E. Sarjeant, Executive Director-Federal Regulatory, US West to A. Richard Metzger, Acting Chief, Common Carrier Bureau (April 26, 1994) (Ex Parte

2. On August 5, 1994, US West filed an Amendment and Request for Modification (Request for Modification) of the Omaha Authorization. This request proposes a revised analog channel allocation plan to be used in US West's trial of video dialtone facilities and service in Omaha. For the reasons discussed below, we find that grant of the Request for Modification, as conditioned, is in the public interest.

II. BACKGROUND

3. In the Omaha Authorization, the Commission authorized US West to offer video dialtone service within its Omaha, Nebraska service area on a trial basis. US West proposed a hybrid fiber-to-the-curb/coaxial cable network to transmit and deliver video dialtone, voice and data services. The network would have the capacity to provide 77 analog channels and 800 to 1,000 digital channels. US West noted that there might be analog channel capacity limitations in the short-run if unexpected demand develops.[4] The Commission granted US West authority to conduct a technical trial limited to six months and a maximum of 2,500 households, as well as a market trial for a period of one year.[5]

4. The Commission examined the US West application to determine whether the proposal met the requirements for video dialtone service, including whether the applicant will provide a basic common carrier platform capable of serving multiple video programmers.[6] The Commission did not rule on US West's proposed channel allocation scheme, stating instead, "we expect US West will expand analog capacity if demand warrants."[7]

5. In a letter dated April 26, 1994, US West asked the Commission to clarify the

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Filing).

[4] Omaha Authorization, 9 FCC Rcd at 185, para. 7.

[5] US West was given the choice by the Commission of offering the trial to as many as 10,000 households. If it chose to do this, however, it had to charge for service after 30 days. Omaha Authorization, 9 FCC Rcd at 188, para. 24. It chose instead to limit its offering to 2,500 households and not to charge end users for the service. Letter from Lawrence E. Sarjeant, Executive Director-Federal Regulatory, US West to William F. Caton, Acting Secretary, FCC (Jan. 21, 1994).

[6] Omaha Authorization, 9 FCC Rcd at 188-89, paras. 26-29; see Second Report and Order, 7 FCC Rcd at 5797, para. 29.

[7] Omaha Authorization, 9 FCC Rcd at 189, para. 28. The Commission noted that US West stated it would expand the capacity of its system to meet additional demand if a shortage develops. US West did not, however, explain how or under what circumstances it would do so. Therefore, the Commission required US West to report within 5 days of denying any video programmer access due to capacity limitations. Id. n.64.

above-quoted language. On May 12, 1994, the Acting Chief of the Common Carrier Bureau responded, in part, to US West's request by a letter asking for additional information with respect to the trial to be conducted in Omaha, as well as the five pending US West applications to provide commercial video dialtone service (May 12 Letter).[8] On May 16, 1994, US West responded to the Common Carrier Bureau with respect to the questions posed regarding its Omaha trial.[9] The National Cable Television Association, Inc. (NCTA) and Metrovision, Inc., a cable television operator providing cable service within the proposed trial areas, commented on US West's response. US West also filed two additional documents reflecting oral ex parte discussions with Common Carrier Bureau staff. The subsequently filed Request for Modification incorporates previous ex parte filings and proposes a revised channel allocation plan. The request was put on public notice and comments were received from NCTA.[10]

6. In support of its Request for Modification, US West asserts that the Commission's statement regarding expectation of expansion "could be construed to require USWC [U S WEST Communications, Inc.] to add analog channels, regardless of expense, practicality or feasibility, should demand for analog channels exceed system capacity."[11] US West claims that such an interpretation would pose significant problems. It states that in order to expand analog channel capacity, the system architecture would have to be re-engineered. It claims that this would be very expensive, would result in the loss of digital capacity, and would cause substantial delay in commencing the trial.[12] According to US West, the problems

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[8] See File Nos. W-P-C-6919, 6921, 6922, 6944, & 6945. The Common Carrier Bureau asked US West to describe certain features of its channel allocation plan. The letter asked if US West plans to use similar channel allocation plans for its commercial systems. It also requested information on the operation of the allocation plan, including details on how the programmers would select programming and what role US West would have in the selection process. The Bureau asked who would control the shared channels, whether customer-programmers would be required to subscribe to the common channels to gain access to the platform, and how the prices for capacity would be set. The letter also asked whether US West intended to enter into an agreement with an independent channel manager.

[9] Letter from Lawrence E. Sarjeant, Executive Director-Federal Regulatory, US West to A. Richard Metzger, Acting Chief, Common Carrier Bureau (May 16, 1994) (First Response). On May 24, 1994, US West responded to the remainder of the request for further information regarding its pending commercial applications.

[10] See Public Notice, DA 94-855 (Aug. 8, 1994).

[11] Ex Parte Filing at 1.

[12] US West offers a detailed explanation of why it cannot add additional analog channels to its system. It states that the proposed architecture uses two cables. The "A" cable has capacity for 78 analog channels and 170 compressed digital channels. Delivery of channels

expansion would cause are so substantial, and the economic return so minimal, that it would be forced to reassess its plans to test video dialtone service in Omaha if analog expansion is required.

7. According to US West, the combined analog and digital capacity of its trial system, as allocated in its revised channel allocation plan, will support multiple video service providers. US West urges the Commission to focus on expanding participation, as opposed to expanded analog channels, in interpreting the expectation of sufficient capacity. It claims that its channel allocation plan expands the number of providers that have access to analog channels. According to the plan, 77 analog channels will be available for assignment on a first-come, first-served basis. Twelve of the 77 analog channels in the network will be designated as common channels.[13] These will be channel numbers 2 through 13, which programmers will not be able to interdict, that is, block the delivery of programming to end users not subscribing to those channels on an individual basis. Twenty-eight interdictable

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2-12 to individual homes cannot, as a technical matter, be blocked, or interdicted, through available interdiction technology. US West states that, although channel 13 can be interdicted, it will initially group that channel with non-interdictable channels because the cable industry often uses channel 13 to carry off-air broadcast programming. Channels 14-78 can be interdicted, thus enabling video information providers to sell programming on individual channels according to demand. The "B" cable will provide power to the system and up to 833 compressed digital channels. According to US West, 16 additional analog channels could be derived using part of the "A" cable capacity, but no interdiction capability exists for this portion of spectrum, and a set-top box and scrambling system in the network would be required. US West states that this would add $79 per home passed. It would take a minimum of six months to develop interdiction capability for these channels. In addition, cable-ready televisions do not tune to these frequencies, and thus one set-top box for analog and another for digital could be required. The "B" cable cannot be used as a power carrier for the architecture and also be equipped with interdiction capabilities. Use of the "B" cable for analog channels would limit the availability of digital capacity on that cable. Blocking of digital services at peak demand times would potentially become unmanageable, and would eliminate the ability to test new on-demand services. Adding a "C" cable would be difficult because no hardware is currently available on which three coaxial cables can be terminated. All components would have to be redesigned, and this could delay the beginning of service for at least an additional year. US West argues that it would also be prohibitively expensive. Another way to meet additional demand would be to bring fiber to a node serving eight instead of 400 customers, but the equipment required would increase the per home passed cost by $250, according to US West, and would require a year's to eighteen months' manufacturing time. Request for Modification at Attachment A.

[13] US West defines "common channels" as channels 2 through 13 that are not interdictable and are available for shared use, possibly for off-air broadcast programming. See Chart 1 attached to the First Response (Chart 1).

analog channels will be designated shared channels.[14] Thus, video programmers could aggregate the common and shared channels into a minimum package of 40 channels, excluding an allocation of non-shared analog channels.[15] In its Request for Modification, US West proposes a revised plan to allocate non-shared analog channels.[16] Under the new plan, four providers requesting blocks of non-shared channels can be accommodated. The first two providers that requested capacity would receive nine non-shared analog channels and the next two would receive eight.[17] In addition, three providers requesting single, non-shared channels would be accommodated with one channel each.

8. US West states that all video program providers or enhanced service providers who request, and are allocated, analog and/or digital capacity will be permitted to participate in determining the programming on the 12 common analog channels. Only those program providers who request shared analog channels will determine what programming appears on the 28 shared analog channels. US West states that it will provide an unaffiliated facilitator to arrange video programmer meetings and to assist the groups in making programming decisions. US West states that the responsibilities of the facilitator will be: (1) to assist the group in establishing decision making rules; (2) to remain neutral as to the outcome; (3) to ensure that all participating programmers have a voice in and accept the outcome of the proceedings; (4) to keep participants focused on the process; (5) to identify relevant issues and ensure that they are addressed and resolved; and (6) to document the decisions for the participants and US West. US West also states that the programmers can choose another

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[14] US West defines shared channels as 28 interdictable channels that will be shared by more than one programmer. See Chart 1.

[15] US West contends that video programmers may want a package of analog channels in order to effectively compete with the incumbent cable operators in Omaha. Request for Modification, Attachment B at 4.

[16] The non-shared analog channels will be available to a single video programmer, rather than shared among several video programmers. The non-shared analog channels will be interdictable.

[17] Under the original plan, the thirty-four non-shared analog channels would have been allocated in blocks of 11 to 17 and only three video programmers could be accommodated. In subsequent discussions with Commission staff, US West indicated that several programmers had expressed interest in participating in its video dialtone trial using blocks of non-shared channels. In fact, if US West were to employ its original channel allocation plan, at least one programmer that expressed a desire to participate with a block of non-shared analog channels would be denied access. Under the revised plan, all four interested video programmers can be accommodated.

facilitator or choose to forgo the use of a facilitator altogether.[18] If the group cannot decide on programming for one or more shared channels, the channels will be returned to the pool to be allocated in the same manner as non-shared analog channels, and thus, the number of channels that could be offered by any one video programmer will decrease. If the programmers cannot reach agreement on the programming to be carried on the common channels, these common channels will be left blank. US West states that it expects that a two-day facilitated session will be sufficient to select the programming, but will provide for a longer session if providers think it necessary. US West will assess a gateway connection charge for a video programmer delivering a video signal to the US West platform and will either hold one designated party responsible for this charge or, if agreed upon in advance, will hold all parties jointly and severally liable.

9. In a separately filed ex parte statement, US West has described how the Omaha trial was publicized and how the potential participants were identified.[19] US West states that since it announced its plans in April 1993, the trial has received widespread media coverage.[20] Many parties contacted US West with questions about trial participation. From these contacts, US West identified 44 parties who either expressed an interest in participating or who requested more information. US West sent these entities a "requester/provider letter," which set out the description of the trial, the eligibility requirements for participation, and deadlines within which participants were to respond.[21] Seven video programmers/video service providers responded and requested analog channel capacity.[22]

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[18] US West believes that the programmers will be motivated to agree because they have a strong desire to participate in the trial and to offer programming that is competitive with that of the cable operators in the area.

[19] Ex Parte Letter from James T. Hannon, Sr. Attorney, US West to William F. Caton, Acting Secretary, FCC (Aug. 19, 1994).

[20] US West attached a list of 80 publications that contained stories about the Omaha video dialtone trials. Id. It has also included several examples of articles about the trial.

[21] The provider letter was dated May 20, 1994 and stated that documentation and completed forms must be received by June 13, 1994 to be considered for allocation of analog channels. US West indicated that these channels would be allocated on a first-come, first-served basis. US West stated that it would not accept requests to participate in the trial after August 1, 1994.

[22] See Ex Parte Letter from James T. Hannon, Sr. Attorney, US West to William F. Caton, Acting Secretary, FCC (Aug. 23, 1994) (correcting actual number of entities requesting analog channels).

III. COMMENTS

10. Metrovision filed comments in response to US West's description of its allocation plan.[23] Although not opposing the allocation plan, Metrovision calls the plan "overly complicated." It also expresses concern about the manner in which first-come, first-served channels will be allocated, and requests confirmation that US West will give interested parties notice of the date that it will begin accepting requests for video dialtone capacity. Metrovision asserts that when limited capacity will not be expanded, no aspect of the allocation procedure should favor one programmer over another.[24]

11. NCTA filed both comments opposing US West's proposal when it was first filed in April and an opposition to the Request for Modification. In its filings, NCTA states that US West's channel allocation plan violates the requirement that the video dialtone platform have the ability to provide capacity to multiple video programmers and to expand as demand increases so as not to be a bottleneck.[25] Its opposition cites Commission statements indicating the Commission's commitment to the policy that video dialtone capacity be capable of expanding to meet demand. NCTA claims that video dialtone is essentially cable service, and thus, should be subject to Title VI cable regulation under the Communications Act. The Commission, however, has chosen a different regulatory scheme because of what NCTA calls "perceived differences." According to NCTA, if US West is allowed to limit capacity, contrary to the Commission's rules, one of the alleged distinctions between the two services will disappear. NCTA does not, however, challenge the technical analysis underlying US West's assertion that analog capacity cannot feasibly be added.

12. Further, NCTA states that US West's proposal violates the video dialtone regulations prohibiting telephone companies from determining how programming is presented for sale, including making bundling or tiering decisions. It argues that US West will be engaging in programmers' functions by proposing specific channel allocations (e.g., by assigning channels 2 to 13 as common channels), by determining categories of programming services (e.g., by using shared and non-shared designations), by determining the number of available channels in each category (e.g., by designating 28 shared channels, blocks of non-shared channels, and 3 individually available channels), and by using a mechanism to assign

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[23] Metrovision requests that its comments be considered even though late-filed. It states that it was not served with a copy of US West's Ex Parte Filing. We grant Metrovision's request and accept its late-filed comments.

[24] Metrovision also urges the Commission to rule on the issues it has raised in a petition for reconsideration before US West proceeds with its proposed trial.

[25] See Second Report and Order, 7 FCC Rcd at 5797-98, para. 30.

channels if demand exceeds supply (e.g., by lottery).[26]

13. NCTA points out that no other programmers beyond the seven referenced in the Request for Modification will be allowed to participate in the trial. In addition, it asserts that even these customers had requested nearly double the number of channels US West proposes to give them. NCTA asserts that US West's plan raises issues of discrimination.[27] Finally, NCTA states that US West has not provided sufficient publicly available information to allow proper evaluation of its plan.[28] Specifically, NCTA states that the Commission should not consider making what NCTA terms "major modifications" to video dialtone policies based on conversations or negotiations. NCTA asserts that certain questions need to be answered, such as whether US West intends to use this revised plan for its commercial services, whether the programmers participating in the trial have understandings about post-trial access to capacity, and whether US West "will acknowledge its legal obligations" if the trial is transformed into a commercial authorization.

IV. DISCUSSION

14. In the Second Report and Order, the Commission emphasized that local exchange company (LEC) provision of a basic common carrier platform with sufficient capacity to serve multiple programmers was "critical" to its finding that video dialtone served the public interest.[29] To ensure that sufficient capacity exists, telephone companies were directed to describe how their proposed systems will meet this requirement. The Commission stated:

> Rather than set forth a specific number of unaffiliated video programmers that must be accommodated or impose minimum capacity requirements, we instead set forth the general principle that the platform must have the ability to provide capacity to multiple video programmers and to expand as demand increases so as not to become a bottleneck that will thwart realization of our public interest goals.[30]

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[26] See Comments in Response to April 26 Ex Parte filing. NCTA also questions the use of a facilitator that is hired, compensated, and perhaps fired by US West as further evidence that US West is engaging in programming activities.

[27] Specifically, NCTA claims that the use of one channel as a barker channel in effect reserves this channel for use by US West's affiliate and it is not clear whether this use will involve US West in programming decisions.

[28] NCTA states that US West may have given more information in the context of ex parte meetings with Commission staff that would clarify its proposal.

[29] Second Report and Order, 7 FCC Rcd at 5797, para. 29.

[30] Id. at 5797-98 (internal footnote omitted).

15. In the Reconsideration Order, the Commission clarified that video dialtone providers were required to expand capacity to the extent technically feasible and economically reasonable.[31] Recognizing that there may be technical limits on the expandability of analog capacity, we sought comment on methods or arrangements for promoting more efficient use of analog channel capacity.[32] We noted that four LECs have proposed "channel sharing arrangements" to maximize use of analog capacity by avoiding carriage of the same video programming on more than one analog channel.[33] We tentatively concluded that channel sharing mechanisms, if properly structured, can offer significant benefits to consumers, video programmers, and LECs, while remaining consistent with the requirements of the cross-ownership provisions of the Communications Act.[34] With the goal of formulating policies and rules governing channel sharing arrangements, we solicited comment on a variety of issues, including how such arrangements should be structured and administered and the proper role that LECs may play in structuring or administering channel sharing arrangements.[35] We stated, however, that we did not intend to defer consideration of Section 214 applications proposing channel sharing mechanisms pending the development of rules and policies governing such arrangements.[36] Finally, we stated that LECs would have their Section 214 authorizations conditioned on compliance with any subsequent rules and regulations that the Commission may adopt regarding channel sharing arrangements.

16. Two issues are raised by US West's request, namely, whether its proposed channel allocation plan comports with the video dialtone capacity requirements and whether the plan impermissibly involves US West in what are essentially video programmer functions. With respect to the first issue, the plan proposed by US West accommodates seven different video programmers requesting analog capacity. Although these video programmers will not be allocated as many non-shared channels as they requested, they will be allocated a reasonable number of non-shared channels, that when added to the common

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[31] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58 and Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, FCC 94-269 at para. 38 (released Nov. 7, 1994) (Reconsideration Order).

[32] Reconsideration Order at paras. 268, 271.

[33] Id. at para. 271.

[34] Id. at para. 274.

[35] Id. at para. 275.

[36] Rather, we stated that we would address those channel sharing proposals on a case-by-case basis. Id.

and shared channels, will enable them to offer end user subscribers almost 50 channels.[37] Two video programmers, the first two that requested capacity, will receive a block of nine non-shared channels and the next two will receive eight non-shared channels. In addition, the three video service providers that requested single analog channels will be accommodated. No video programmer that expressed interest in participating in the Omaha trial would be excluded. US West has demonstrated that details of the Omaha trial were widely publicized, and that a significant number of video programmers expressed an interest and were afforded the opportunity to participate. Video programmers requesting non-shared channel blocks from US West have indicated that they are willing to participate in the trial under the revised channel allocation plan.

17. Under these narrow circumstances, we find that US West's plan has sufficient capacity to serve multiple video programmers, and thus satisfies our video dialtone requirements. In the SNET Initial Trial Order, we stated that when evaluating a trial application and its proposed platform capacity we would consider: (1) the initial capacity available; (2) the ability to expand this capacity; (3) the demand for capacity; and (4) the duration of the offering.[38] US West's basic platform will initially offer 77 analog channels and approximately 1,000 digital channels. Under the revised channel allocation plan, US West's platform will accommodate the seven video service providers who requested analog capacity. Furthermore, because US West's Omaha trial is limited to only one year, we agree with US West that it would be economically unreasonable to require US West to expand the analog portion of the platform's capacity during the limited trial. We believe that the plan as presented is fair and non-discriminatory because all video programmers will have access to the platform under the same terms and conditions.[39] Our determination is limited to US West's Omaha trial and is not to be construed as approval of this plan or any similar plan for

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[37] Roughly 80 percent of all reporting cable systems offer no more than 53 channels of video programming. NCTA, Cable Television Developments at 10-A (Fall 1994) (citing Warren Publishing, Inc. Television & Cable Factbook, Services, Vol. No. 62 at I-69 (1994)).

[38] The Southern New England Tel. Co., 9 FCC Rcd 1019, 1022 n.46 (1993) (SNET Initial Trial Order). Expansion of platform capacity is not an absolute requirement. In the video dialtone Reconsideration Order, we clarified that carriers were required to expand capacity to the extent technically feasible and economically reasonable. Reconsideration Order at para. 38.

[39] With regard to Metrovision's request that US West give interested parties notice of the date that it will begin accepting requests for capacity, we note that US West has already completed this process, and that the seven video programmers that requested analog capacity were allocated analog capacity. See supra notes 21-22.

US West's commercial applications or for other trial proposals.[40]

18. We find unpersuasive NCTA's contention that US West's proposed allocation plan violates our video dialtone rules by allowing US West to bundle or tier video programming. Under our video dialtone rules, local telephone companies are not permitted to determine how video programming is presented for sale to subscribers, including making decisions concerning the bundling or tiering of the programming or the price, terms, or conditions on which the programming is offered to subscribers.[41] Although US West proposes to designate capacity for certain types of use by customer-programmers, i.e., common, shared, or non-shared, we find that the designation of these channels does not constitute determining how programming is presented for sale to subscribers. Rather, the allocations US West has proposed will govern the relationships between US West and the customer-programmers providing programming through the platform.

19. Moreover, US West will not participate in the selection of video programming, but only offers to facilitate the efforts of the video programmers to choose the content to be carried on the shared and common channels -- an offer they are free to reject. The video programmers themselves will choose what is to be carried on the common and shared channels. If the facilitator is not acceptable to the group of providers, the group can choose another facilitator from among themselves or from an outside source, or can decide not to use a facilitator at all. US West indicates that it will play no role in these group meetings. Based on these representations and given the limited scope and duration of the proposed trial, we find that US West has sufficiently isolated itself from video programmer functions to meet the requirements of our video dialtone policies.

20. We also find unpersuasive NCTA's assertion that the proposed plan is discriminatory because US West or an affiliate proposes to use one analog channel to provide information about the services available on a level two enhanced gateway. US West has committed to offering capacity on the platform to all video programmers on the same terms and conditions, i.e., a first-come, first-served basis.[42] In addition, US West states that it will not, either directly or indirectly through an affiliate, "request analog channels for programming to be accessed on its enhanced gateway."[43]

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[40] Recently, US West filed amendments to its pending commercial video dialtone applications, modifying its system architecture and proposing that all analog channels on the platform be available on a shared basis. See, e.g., U S WEST Communications, Inc. Amendment, File No. W-P-C-6919 (Oct. 25, 1994).

[41] Reconsideration Order at para. 64.

[42] Letter from Lawrence E. Sarjeant, Executive Director-Federal Regulatory, US West to A. Richard Metzger, Acting Chief, Common Carrier Bureau (April 26, 1994) at 2.

[43] Id.

21. Furthermore, we conclude that the use of an analog channel by US West or an affiliate does not indicate that US West is improperly involved in programming decisions.[44] Under the terms of the Omaha Authorization, US West is not permitted to provide video programming on the platform, either directly or indirectly through an affiliate, to subscribers during the trial.[45] In June 1994, the U.S. District Court for the Western District of Washington declared the statutory telephone company-cable television cross-ownership restriction, codified at 47 U.S.C. § 533(b), unconstitutional because the restriction violates the First Amendment.[46] US West has not asked, either in its original application or in its request for modification, to provide video programming directly to subscribers during the trial.[47] We respond here only to US West's request for approval of its revised channel allocation plan.

22. We also reject NCTA's argument that video dialtone service is essentially cable television service. In contrast to cable service where the cable operator decides what programming is offered to subscribers, US West will have no role and will not participate in decisions regarding the video programming that is presented over the system.[48] Moreover,

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[44] See Omaha Authorization, 9 FCC Rcd at 189, para. 30; see also Letter from Lawrence E. Sarjeant, Executive Director-Federal Regulatory, US West to A. Richard Metzger, Acting Chief, Common Carrier Bureau (April 26, 1994) at 2.

[45] Telephone company provision of video programming (if otherwise lawful) raises a host of regulatory issues not addressed in this record that would need to be decided prior to permitting such activity. US West is not permitted under its Section 214 authorization or under this Order to provide video programming directly to subscribers during the trial. See Omaha Authorization, 9 FCC Rcd at 189, 191, paras. 26-27, 35(g).

[46] U S WEST, Inc. v. United States, 855 F. Supp. 1184 (W.D. Wash. 1994), appeal pending, No. 94-35775 (9th Cir. argued Nov. 15, 1994).

[47] See Letter from Lawrence E. Sarjeant, Executive Director-Federal Regulatory, US West to A. Richard Metzger, Acting Chief, Common Carrier Bureau (April 26, 1994) at 2.

[48] In the video dialtone First Report and Order, the Commission concluded that neither a telephone company providing video dialtone service, nor its video programmer-customers, would be required to obtain a cable television franchise under Section 621(b) of the Cable Act. Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, 7 FCC Rcd 300, 325-26, paras. 50-52 (1991) (First Report and Order), recon. granted, Memorandum Opinion and Order, 7 FCC Rcd 5069 (1992) (clarification of decision not to require cable television franchises for telephone companies and video programmers). The Commission concluded that because telephone companies are statutorily prohibited from providing video programming directly to subscribers in their telephone service areas, telephone companies cannot provide "cable service" under existing law. The Commission

we find that US West will not be improperly "limiting" channel capacity because the platform will continue to offer approximately 1,000 digital channels.

23. We also reject NCTA's contention that the information in this record is inadequate for us to process the application. NCTA's assertion that more information is necessary on the use of the plan in connection with any other service offering is misplaced because US West has only requested modification of the Omaha Authorization and approval of the allocation plan for the Omaha trial.[49] In this order, we are approving the use of US West's plan under very narrow circumstances only for the limited trial to be offered in Omaha. Furthermore, our action on this request has been taken in full compliance with our ex parte rules. It is based on documents filed with the Commission by US West, NCTA, and Metrovision, that is, formal pleadings, written ex parte presentations, and statements made in written summaries of oral ex parte presentations. These documents are part of the public record, and are available for public inspection and photocopying.

24. Finally, so that we may judge the success of US West's plan for allocating analog channels, we will require US West to report to us within three months from the date on which video programmers' service to end user subscribers begins, and include the following details: 1) a description of the facilitated program selection sessions and the results of such meetings; and 2) the number of video programmers and video service providers participating and the number of shared, common, and dedicated analog channels to which each has access.

V. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the request of U S WEST Communications, Inc. to modify its Omaha trial video dialtone authorization, 9 FCC Rcd

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concluded, further, that local telephone companies were not "cable operators" since they did not offer "cable service" over a "cable system." Based on these conclusions, the Commission determined that telephone companies need not obtain a cable television franchise before offering video dialtone service. Recently, the United States Court of Appeals for the District of Columbia Circuit upheld as reasonable the Commission's interpretation of Section 621(b) of the Cable Act. National Cable Television Ass'n v. FCC, No. 91-1649, slip op. at 9, 13, 14, 16 (D.C. Cir. August 26, 1994).

[49] As noted in paragraph 15, supra, in the video dialtone Third Further Notice of Proposed Rulemaking, the Commission is seeking comment and information on channel sharing arrangements generally and other mechanisms to address analog capacity limitations. See Reconsideration Order at para. 275. We believe it would be contrary to the public interest to delay US West's trial in Omaha until the Commission takes further action in that rulemaking proceeding.

184, IS GRANTED and the applicant is authorized to use the revised analog channel allocation plan as described in this Order.

26. IT IS FURTHER ORDERED, that grant of this Authorization is subject to the following conditions:

(a) that US West comply with any subsequent rules and regulations that the Commission may adopt with respect to channel sharing mechanisms; and

(b) that US West file the report described in paragraph 24 of this Order and Authorization.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Applications of	)	
	)	
AMERITECH OPERATING COMPANIES	)	
	)	
For Authority pursuant to Section 214	)	File Nos. W-P-C-6926
of the Communications Act of 1934, as	)	W-P-C-6927
amended, to construct, operate, own,	)	W-P-C-6928
and maintain advanced fiber optic	)	W-P-C-6929
facilities and equipment to provide	)	W-P-C-6930
video dialtone service within	)	
geographically defined areas in	)	
Illinois, Indiana, Michigan, Ohio,	)	
and Wisconsin	)	

ORDER AND AUTHORIZATION

Adopted: December 23, 1994 **Released:** January 4, 1995

By the Commission:

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Appendix: Pleadings Filed

I. INTRODUCTION

1. On January 31, 1994, the Ameritech Operating Companies (Ameritech) filed five applications for authority to provide video dialtone. For the reasons set forth below, we grant all five of the applications,[1] subject to the conditions set forth in this Order. We find that the proposed systems will promote the "public convenience and necessity"[2] in the areas they will serve, in part by providing competition in the local distribution of video services, by promoting efficient investment in the national telecommunications infrastructure, and by fostering the availability of new and diverse sources of video programming.

2. In the Video Dialtone Order, the Commission determined that, through video dialtone, local telephone companies could participate in the video marketplace, consistent with the statutory

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1 The term "applications" refers to all five applications collectively.

2 47 U.S.C. § 214.

telephone company-cable television cross-ownership restrictions.[3] We defined "video dialtone" as the provision by a local telephone company of a basic common carrier platform to multiple video programmers on a nondiscriminatory basis.[4] A "basic platform" is a common carriage transmission service coupled with the means by which end-user subscribers can obtain access to all video programming carried on the platform.[5] If a local telephone company offers such a basic platform, it may also provide enhanced and non-common carrier services related to the provision of video programming in addition to basic common carrier services associated with the platform.[6] The Commission also determined that a Section 214 application is the proper procedural vehicle for proposing video dialtone services.[7]

II. THE APPLICATIONS

3. On January 31, 1994, Ameritech filed Section 214 applications to provide video dialtone service in selected areas of Illinois, Indiana, Michigan, Ohio, and Wisconsin. Five parties filed petitions to deny or comments in response to one or more of the applications.[8] On March 24, 1994, Ameritech filed its Consolidated Opposition to the Petitions to Deny. On April 5,

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3 The Commission adopted video dialtone rules in Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (Video Dialtone Order), recon. FCC 94-269 (rel. Nov. 7, 1994) (VDT Recon Order), appeal pending sub nom., Mankato Citizens Telephone Company v. FCC, No. 92-1404 (D.C. Cir. Sept. 9, 1992).

4 Video Dialtone Order at ¶ 2.

5 Id. at n.3

6 Video Dialtone Order at ¶ 2. The telephone company may offer enhanced and other nonregulated services related to video programming to any video programmer, in areas substantially served by a video dialtone platform, without regard to whether the video programmer purchasing such services has any nexus to that platform. VDT Recon Order at ¶ 88.

7 Video Dialtone Order at ¶ 72. VDT Recon Order at ¶¶ 21, 141-142. Generally, Section 214 requires Commission authorization before a carrier extends a new interstate line of communication. 47 U.S.C. § 214(a).

8 A list of the pleadings filed on the applications and the citations used in this order are contained in the Appendix.

1994, four parties filed replies to Ameritech's Opposition. On April 28, 1994, the Acting Chief of the Common Carrier Bureau asked Ameritech to respond to staff questions regarding the applications. On May 9, 1994, Ameritech filed its response, and on May 16, 1994, three parties filed comments on Ameritech's response to the staff questions. On June 29, 1994, Ameritech filed a second response to further staff questions regarding the applications. On November 21, 1994, NCTA filed a Motion to Dismiss, claiming, among other things, that Ameritech had failed to revise its applications to reflect changes to the Commission's video dialtone policies adopted in the VDT Recon Order. On December 1, 1994, Ameritech filed its opposition to the motion, and reply comments were filed on December 6, 1994.[9]

4. In the applications, Ameritech proposes to construct stand-alone facilities in order to provide video dialtone service.[10] Ameritech's proposed systems would be capable of providing video services on a common carrier basis over a hybrid fiber-coaxial cable infrastructure.[11] Ameritech states that its existing facilities are not capable of providing video dialtone service and no joint plant would be constructed.[12] Ameritech asserts that, because its proposed network does not contemplate construction of joint facilities or provision of telephony over the video dialtone facilities, separations and cost allocation concerns are minimal and can be addressed by current Commission regulations.[13]

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9 This motion is discussed in Section IV, infra.

10 While the video dialtone system will be capable of delivering telephony services, Ameritech will not use the system for such services at this time. Applications at 10, Opposition at 10. In the event that Ameritech elects to offer local exchange and exchange telephone access services over its video dialtone facilities, it must first submit and obtain approval of an accounting and cost allocation plan that is consistent with our rules then in effect.

11 Ameritech proposes to use fiber to link its video serving center to the node and coax cable to link the node, through a tap, to the end user. See Applications, Exhibit B. The node will initially serve approximately 500 homes, but may serve fewer homes as demand for service, particularly the switched digital service, grows. Applications at 12.

12 Applications at 11.

13 Id.

5. Ameritech maintains that approval of the applications would permit its video dialtone network to reach 1.3 million homes, businesses and institutions in geographically and economically diverse sections of its service area.[14] The proposed hybrid network would provide 310 multicast (240 digital and 70 analog) channels and 80 switched digital channels.[15] The analog channels will be available individually or in ten channel blocks.[16] There will be 30 digital multicast channel blocks available, with each block capable of providing 2 to 16 separate digital multicast channels, depending on the level of compression chosen by the programmer-customer.[17] These blocks will be made available individually on a first-come, first-served basis. Ameritech proposes to permit a programmer-customer to lease no more than one half of the channels for exclusive use for the first year. After the first year any available channels will be available to any party, regardless of how many channels they may have previously leased.[18]

6. Ameritech maintains that this architecture would allow it to offer the maximum flexibility to programmers on the platform. As a result, end-users could choose to receive services resembling current cable television service, including basic broadcast services, or subscribe to video-on-demand or interactive services, or any combination of those services.[19] Ameritech also observes that only those end-users subscribing to digital services would

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14 Opposition at i. Ameritech proposes to pass 232,000 homes, businesses and institutions in the Detroit area; 262,000 in the Cleveland and Columbus areas; 115,000 in the Indianapolis area; 501,000 in the Chicago area; and 146,000 in the Milwaukee area. See Applications at 1.

15 Id. at 6. Analog multicast service would permit continuous, one-way, transport of the same analog video signal from a video information provider to a large number of end-users. Similarly, digital multicast service would permit continuous, one-way, transport of the same compressed digital video signal from a video information provider to a large number of end-users. Switched digital service would permit one-way, transport of a compressed digital video signal from a video information provider to a selected end-user, along with two-way transport of control signals. Applications at 5, n. 11. See also Applications, Exhibit A.

16 Applications at 12.

17 Id. at 12, n. 22.

18 Id. at 6.

19 Id. at 8.

require a digital set-top box.[20] In addition, the system could be re-engineered to serve 125 homes per node rather than the initial 500 homes. This would increase the number of end-users that could use switched digital service without causing blocking.[21]

7. In order to maximize the number of channels available to programmer-customers, Ameritech proposes to designate as many as 13 analog channels as "common channels" that a Common Channel Manager would make available on a non-discriminatory basis to all programmer-customers. The Common Channel Manager would not be affiliated with Ameritech, and Ameritech would not participate in the selection of programming channels.[22] Programmer-customers would not be required to subscribe to the common channels to obtain access to the video dialtone platform and could subscribe either to individual channels or the block of channels.[23] Ameritech maintains that this mechanism would allow the network to offer popular channels efficiently to all programmer-customers without unnecessary channel duplication.[24] In its illustrative tariff, Ameritech outlines the basic requirements for programmer-customers and end-user subscribers.[25] The minimum service period for programmer-customer services would be one year.[26]

III. DISCUSSION

8. In order to determine whether Ameritech's applications to offer commercial video dialtone service should be granted, the applications must satisfy the requirements of both the Commission's

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20 Id. The set-top box would be provided, like other customer premises equipment (CPE), on an unbundled, unregulated basis. See Opposition at 21 n. 64. See also 47 C.F.R. § 64.702(e).

21 Id. at 12.

22 The illustrative tariff states that common channels "will be used for signal transmission of popular programming in a given market, and are selected by the Common Channel Manager." Applications, Exhibit H at 5. The illustrative tariff also states that the Common Channel Manager will make the common channels available to other customer programmers upon request and on non-discriminatory terms. Id.

23 Response Letter at 7-9.

24 Applications at 6; Response Letter at 7.

25 Applications, Exhibit H.

26 Id. at 11.

video dialtone policy[27] and Section 214 of the Communications Act, as amended.[28] Petitioners contend that the applications satisfy neither. We consider first the contentions that these applications do not satisfy our video dialtone requirements, and then turn to the issues raised under Section 214.

A. Video Dialtone Issues

1. Overview

9. To qualify as video dialtone under our rules, a service must meet the requirements set forth in our Video Dialtone Order and modified and clarified in the VDT Recon Order. Among other things, the service must include a basic common carrier platform available to multiple video programmers on a nondiscriminatory basis, and a means by which end-user subscribers can access any and all of the video programming offered.[29] The platform must provide "sufficient capacity to serve multiple video programmers."[30] After extensive evaluation, we conclude that the system proposed by Ameritech does satisfy the "basic platform" requirement of our video dialtone rules. For the reasons set forth below, we conclude that Ameritech's applications meet the requirements of nondiscrimination and adequate capacity.

2. Sufficient Capacity

a. Comments

10. Several parties voice concern about Ameritech's limited discussion in its application of its plans to expand analog

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27 See Video Dialtone Order and VDT Recon Order, supra note 3.

28 47 U.S.C. § 214.

29 Video Dialtone Order at ¶ 2 & n.3. See also VDT Recon Order at ¶¶ 30-34.

30 Video Dialtone Order at ¶ 29. The platform also must be expandable, pursuant to the Commission's requirement that "the platform must have the ability . . . to expand as demand increases so as not to become a bottleneck that will thwart realization of our public interest goals." Id. at ¶ 30. We have subsequently clarified that, "under our video dialtone requirements, local exchange companies (LECs) are required to expand whenever, and to the extent that, expansion is technically feasible and economically reasonable." VDT Recon Order at ¶ 38. The Commission will address claims that expansion is not technically feasible and economically reasonable on a case-by-case basis. Id.

capacity if such expansion proves necessary and reasonable to satisfy demand by programmer-customers. Joint Petitioners assert that not only is the currently proposed capacity insufficient, but Ameritech also fails adequately to discuss in its applications any plans or strategies for expanding its capacity if demand for the service requires it.[31] The Great Lakes Cable Coalition (GLCC) disputes Ameritech's assertion that the proposed system would initially provide "a total of 390 analog and digital channels and will be able to accommodate hundreds of video programming sources."[32] Instead, GLCC asserts that Ameritech initially, at best, will be able to provide 70 channels to no more than 70 video programming sources.[33]

11. Ameritech responds by asserting that its network architecture is designed to meet currently forecasted demand. Ameritech identifies four mechanisms for expanding capacity if necessary, however.[34] First, Ameritech asserts that, if demand is sufficient, digital multicast channels may prove a cost-effective alternative to analog channels by allowing eight channels to be offered in the same bandwidth required for a single analog channel. Ameritech maintains that the ability to present eight digital channels for the same transport cost as one analog channel well might offset the initial high cost of digital converters. Second, analog capacity could be increased by narrowing the delivery area served by a video serving office, allowing a programmer customer to lease analog capacity delivered to less than the total service area and opening analog capacity elsewhere for other providers. Third, if necessary, some bandwidth Ameritech plans to use for digital service could be used to provide analog channel capacity on an interim basis. Finally, Ameritech asserts that switched analog technology, which would work in the same fashion as switched digital technology, may allow it to provide increased analog capacity to programmer customers by not requiring the distribution of a signal unless an end user requests it.[35]

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31 Joint Petition at 14.

32 GLCC Petition at 11, citing Application at 5. See also GLCC Response at 9-13.

33 GLCC Petition at 11-12.

34 Response Letter at 11-12.

35 As described by Ameritech, "program signals would not be placed on the local distribution network unless requested by at least one end user. At the same time, switching would allow a greater number of inputs (i.e. available channels from video information providers) than outputs (channels to end users). The result would be that video information providers

12. Several parties assert that Ameritech's proposed digital capacity presupposes technology not yet commercially available.[36] NCTA, for instance, maintains that digital compression is not yet commercially feasible and, accordingly, cannot be relied upon to solve the limitation on available channels. In response, Ameritech lists specific examples of vendors able to supply the equipment in question; Ameritech also asserts that in several cases cable systems are already beginning to deploy similar technology.[37]

b. Discussion

13. A local telephone company that wishes to provide a video dialtone service must make available a basic common carrier platform to multiple video programmers, and must be able to expand its capacity to accommodate increasing demand so as not to become a bottleneck.[38] The capacity must be expanded to the extent it is technically feasible and economically reasonable.[39] In the NJ Bell Order, we stated that, in applying the capacity requirement, we would review each application on a case-by-case basis taking into consideration: (1) the initial capacity available; (2) the applicant's ability to expand this capacity; and (3) the demand for capacity.[40]

14. For the following reasons, we conclude that Ameritech's proposed system will offer sufficient capacity to satisfy the requirements of the Video Dialtone Order. The initial capacity of the system will be 70 analog multicast channels, 240 digital multicast channels, and 80 switched digital channels. Ameritech has stated that it chose that allocation scheme in light of the expected demand for analog channels. Based on the existing record,

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could provide more choices to end users over the same amount of analog capacity." Response Letter at 12.

36 See, e.g., NCTA Petition at 7 and Declaration of Wendell H. Bailey; GLCC Petition at 12 and Declaration of Nicholas Worth.

37 See Opposition, Declaration of Jack Reily, Declaration of Dwight B. Duke, Declaration of Alexandre A. Balkanski, and Declaration of Guy Lauvergeon.

38 Video Dialtone Order at ¶¶ 2, 29, 30.

39 VDT Recon Order at ¶ 38.

40 New Jersey Bell Telephone Company, 9 FCC Rcd 3677, ¶ 41 (NJ Bell Order); see also Southern New England Telephone Co., 9 FCC Rcd 1019 at ¶ 13, n. 46 (SNET Trial). In SNET Trial we also considered a fourth factor, applicable to trials, which is the duration of the offering.

we find it unlikely that the number and allocation of channels proposed will not be adequate to accommodate foreseeable demand. Certainly no party in this proceeding has suggested that a total of 390 channels would not be adequate. Several parties, however, do challenge the ability of Ameritech initially to provide that many channels by questioning the availability of digital service at this time.[41] Therefore, we require, as a condition of this authorization, that any video dialtone service offered by Ameritech in the five areas specified in the applications provide at least the proposed 390 channels. This requirement is consistent with the representations made by Ameritech in the applications and subsequent filings about its ability to provide digital service.[42]

15. Another issue is whether Ameritech's plan initially provides for sufficient analog capacity. If demand for analog channels does exceed the number of such channels available, Ameritech has identified four mechanisms for expanding capacity to meet demand, three of which would expand analog capacity so that end users would not need to use digital set-top boxes, unless they subscribe to digital services.[43] Finally, consistent with our ruling in the VDT Recon Order, we will require Ameritech to report to the Chief of the Common Carrier Bureau, within thirty days after it becomes aware of an anticipated capacity shortfall or within five days of denying a programmer-customer access to analog channels due to limited capacity, whichever occurs first.[44] In that report, Ameritech shall describe the steps taken to accommodate the programmer-customer denied access to the platform. To the extent that Ameritech believes that expansion is not technically feasible or economically reasonable at that time, it must explain in detail the basis for that determination and indicate when it anticipates expansion would be technically feasible and economically reasonable.[45]

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41 In the Third Notice of Proposed Rulemaking we seek comment on when digital compression and transmission will be available on a broad scale and the costs of such equipment, including the impact on low-income subscribers. VDT Recon Order at ¶ 270.

42 Opposition at 3-6.

43 See Response Letter at 11-12.

44 See VDT Recon Order at ¶ 38.

45 Id.

3. Nondiscriminatory Access

a. Comments

16. Several commenters voice reservations regarding the potential for discrimination in programmer-customers' and end users' access to Ameritech's proposed video dialtone platform.[46] First, they object to Ameritech's proposal to allocate up to 13 channels to the Common Channel Manager, contending that such an arrangement inherently entangles Ameritech in programming decisions in direct conflict with the Video Dialtone Order.[47] Ameritech responds that the shared channel mechanism is not intended to embroil the company in programming decisions, nor will that be the effect. Ameritech asserts that the mechanism is simply a means of effectively using network resources and avoiding the inefficiencies that might result if different programmer-customers duplicated the same core programming over different channels. Any programmer-customer wishing to offer its customers any or all of the channels offered by the Common Channel manager will be able to do so without duplicating the offering of another programmer-customer. Finally, Ameritech argues that it would avoid any impermissible entanglement in programming decisions by establishing objective guidelines for selecting the Common Channel Manager beforehand.[48]

17. The petitioners next argue that Ameritech's proposed set-aside of shared channels is in conflict with the basic common carrier format envisioned in the Video Dialtone Order. Several parties assert that the proposed service deviates so fundamentally from the guidelines set forth in the Video Dialtone Order that the service is not even video dialtone but simply cable television service. For example, Joint Petitioners contend that the Common Channel Manager proposal "is wholly at odds with the common carrier concept contemplated by the Video Dialtone Order."[49] NCTA argues that the set-aside favors broadcast programmers and whatever entity is selected as the "Common Channel Manager."[50] The Illinois

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46 See, e.g., NCTA Petition at 4-11, GLCC Petition at 8-11, Joint Petition at 11.

47 See, e.g., Joint Petition at 12, GLCC Petition at 16-18.

48 Opposition at 16.

49 Joint Petition at 10-13.

50 NCTA Petition at 3.

Commission states that it is generally troubled by the lack of information regarding the terms and conditions of access to the proposed video dialtone platform.[51]

18. Ameritech responds that the Common Channel Manager can be implemented in a fashion that causes no discrimination. In particular, Ameritech argues that, by facilitating efficient use of the network capacity, the Common Channel Manager will increase the "unfettered access for all program providers."[52] In its response to staff questions, Ameritech also asserts that the shared channel mechanism includes no requirement that broadcast channels be included among the common channel line up.[53] Ameritech maintains that certain channels will be necessary in any particular market if programmer-customers on its video dialtone network are to compete successfully with an incumbent cable system. The Common Channel Manager mechanism is designed to enable these programmer-customers to offer a core of popular channels without diminishing network capacity.[54]

19. GLCC alleges that Ameritech's systems will be built in wealthier neighborhoods and will ultimately result in a class of "information have nots."[55] The same issue has also been raised in a Petition for Relief which was filed by a coalition of consumer and civil rights groups on May 23, 1994.[56] They allege that the Section 214 applications of several telephone companies, including Ameritech, demonstrate a pattern of avoiding low income areas and areas with a high concentration of minorities.[57] Ameritech states that it did not discriminate in this manner in choosing the initial

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51 Illinois Commission at 3.

52 Opposition at 15 citing Video Dialtone Order at ¶ 44.

53 Response Letter at 10-11. Ameritech describes its original statement in the applications as simply illustrative speculation. Id.

54 Id.

55 See GLCC Petition at 8.

56 Center for Media Education, et al., Petition for Relief from Unjust and Unreasonable Discrimination in the Deployment of Video Dialtone Facilities, RM-8491 (CME Petition).

57 Id. at 6-7.

areas to receive video dialtone service.[58] It argues, contrary to the allegations, that those initial service areas are very similar to its total service area in terms of racial and ethnic diversity, and that 35 percent of the population in those initial service areas have incomes below the median household income level for Ameritech's total service area.[59] Additionally, Ameritech states that these five applications only cover 1.3 million customer locations of the approximately 6 million locations it plans to pass by the end of the decade.[60] The Petition for Relief is currently pending before the Commission.

20. GLCC suggests that Ameritech's real intent in building a stand-alone video dialtone system is to position itself to provide cable service when the cable-telco cross-ownership ban is removed.[61] Joint Petitioners argue that, if the provision of cable service is Ameritech's ultimate intention, then the Commission should not act on the applications until Ameritech's constitutional challenge to the cable/telephone cross-ownership restrictions is resolved.[62] Ameritech acknowledges its constitutional challenge, but asserts that a pending court case does not bar it from simultaneously seeking authority to become a video dialtone provider.[63] Ameritech states that, when it is allowed to provide video programming, it will fully comply with any rules governing that service.[64]

21. NCTA also argues that Ameritech's proposal that there be a one-year minimum service period for which programmer-customers will be charged is discriminatory and prejudices the interests of

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58 Ameritech Opposition to Petition for Relief and Petition for Rulemaking, RM-8491 (filed July 12, 1994) (Petition Opposition) at 1.

59 Id. at 4. See also Opposition at 18 (the communities contained in the initial deployment areas represent a wide variety of income levels, with the median annual household income level for those communities as low as $13,500).

60 Petition Opposition at 4. See also Opposition at 18.

61 GLCC Petition at 10 n.24.

62 Joint Petition at 17. The U.S. District Court for the Northern District of Illinois subsequently ruled in Ameritech's favor and held the statutory cross-ownership restrictions to be unconstitutional. Ameritech v. USA, No. 93-C-6642, slip op. (N.D. Ill. Oct. 27, 1994).

63 Opposition at 8.

64 Id.

smaller "part-time" or "one-time" programmers in direct contravention of the Video Dialtone Order.[65] Ameritech presents two responses. First, as a procedural matter Ameritech asserts that, since this provision is part of its illustrative tariff, any discussion of this issue should be deferred to the tariff process.[66] Beyond that, Ameritech argues that the one-year commitment is designed to achieve stability in programming and preserve end user demand for the product.[67] Ameritech also contends that, if there is sufficient demand by part-time programmers, a resale market will develop.[68] NCTA replies that the cable industry has provided commercial and public access to part-time users for years though public, educational and government (PEG) channels and leased access channels without the type of customer complaints that Ameritech cites to support the need for a one-year commitment.[69]

b. Discussion

22. In the Video Dialtone Order, we required local exchange companies to provide video dialtone service on a common carrier basis and unequivocally affirmed that requirement on reconsideration.[70] An essential element of the common carrier nature of video dialtone is nondiscrimination with regard to both programmer-customers and end-users. We conclude that, with appropriate conditions, Ameritech's applications satisfy the requirements for nondiscriminatory access set out in the Video Dialtone Order and affirmed in the VDT Recon Order. We are not approving the Common Channel Manager proposal, however, and will require Ameritech to amend its authorization before using a channel

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65 NCTA Petition at 4-7.

66 Opposition at 16-17.

67 Id. at 16-18. Ameritech argues that: "Channel churn can be viewed negatively by end-users, resulting in lower acceptance. Continual shuffling of channel assignments can be confusing and frustrating to end-users, even on a small scale." Id. at 17.

68 Id.

69 NCTA Reply at 4.

70 Video Dialtone Order at ¶ 2. VDT Recon Order at ¶ 32. See also NCTA v. FCC, No. 91-1649, slip op. at 18 (D.C. Cir. Aug. 26, 1994) ("[V]ideo dialtone is a common carrier service, the essence of which is an obligation to provide service indifferently to all comers -- here, to provide service to all would-be video programmers").

sharing mechanism. In addition, we find Ameritech's proposal to allow programmer-customers to lease any unused channels after one year, regardless of how many channels that programmer-customer already leases, and its proposed one year lease term to be inconsistent with our video dialtone policies.

23. Based on the current record and given our understanding of the current state of technology, we find no inherent conflict between the reliance on shared channels to make more efficient use of the available bandwidth in Ameritech's proposed network architecture and the nondiscrimination requirements of the Video Dialtone Order. Indeed, in the VDT Recon Order we tentatively concluded that "channel sharing mechanisms, if properly structured, can offer significant benefits to consumers, programmer-customers, and video dialtone providers, while remaining consistent with the provisions of the 1984 Cable Act."[71] We recognized, however, that the implementation of a shared channel plan raises significant legal and policy issues, such as the possibility of unreasonable discrimination. Consequently, we have sought comment in the VDT Recon Order on a number of issues related to whether channel sharing should be permitted and, if so, what rules and policies are required to ensure that any such arrangement will further the public interest and remain consistent with the 1984 Cable Act.[72] We specifically noted that, pending development of such rules, we will continue to consider channel sharing plans in pending 214 applications, such as Ameritech's, on a case-by-case basis.[73] Channel sharing arrangements approved prior to the completion of the rulemaking will be conditioned upon compliance with any subsequently adopted rules of general applicability governing channel sharing.

24. Upon review of the record in this proceeding, we find that Ameritech has not provided an adequate explanation of how its Common Channel Manager mechanism would work. For example, it is not clear how the Common Channel Manager (CCM) will be selected. Ameritech has stated that each party that desires to be the CCM would have to submit a written proposal to Ameritech. Ameritech listed a number of criteria it would use in reviewing those proposals.[74] It has not explained, however, how it will weigh the criteria or otherwise evaluate the proposals. Consequently, we will not authorize Ameritech to use such a mechanism at this time. If Ameritech continues to desire to use a channel sharing

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71 VDT Recon Order at ¶ 274.

72 Id. at ¶ 275.

73 Id.

74 Response Letter at 9-10.

mechanism, it must file an amended Section 214 application seeking Commission approval of its specific mechanism before using such a mechanism with any of these video dialtone systems. As noted above, use of any shared channel mechanism will also be conditioned on compliance with any requirements subsequently promulgated in the video dialtone proceeding, or any related proceeding.[75]

25. We are not persuaded that we should deny this application because of assertions that Ameritech is simply seeking this authorization to begin construction of a conventional cable system in anticipation of a favorable ruling in its constitutional challenge to the cross-ownership prohibition. The applications before us propose construction of a system capable of providing video dialtone service and seek authority to provide such service. The petitioners make no credible argument as to why Ameritech's constitutional challenge to the prohibition against cross-ownership should bar its receiving authorization to offer video dialtone service.

26. While Ameritech has subsequently been granted relief from the cross-ownership prohibition,[76] the applications do not propose that Ameritech or an affiliate will directly provide video programming to subscribers in the service areas. Rather, Ameritech requests authority to provide only video dialtone services, as well as unregulated non-common carrier services. We consider these applications under our video dialtone rules, and do not address any of the regulatory issues raised by the possible provision by Ameritech of video programming to end-users over this video dialtone platform. If Ameritech requests appropriate authority to directly provide video programming to end-users, we will consider that request under the rules then applicable to telephone company provision of video services.[77]

27. Regarding the scope of Ameritech's deployment of video dialtone service, the Video Dialtone Order found that market forces should determine how and when the technology is deployed and services are offered to the public.[78] We recognize that deployment of video dialtone will occur gradually, so that for a time it may reflect economic differences between communities. As with other common carrier services, we have not required that entire

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75 See VDT Recon Order at ¶ 275.

76 Ameritech v. USA, No. 93-C-6642, slip op. (N.D. Ill. Oct. 27, 1994).

77 See NJ Bell Order at ¶ 8 n. 27.

78 Video Dialtone Order at ¶ 103.

communities be wired before anyone can receive service.[79] GLCC's allegations concerning Ameritech's deployment offer no substantive evidence of any discriminatory intent or effects in Ameritech's choice of areas for its initial deployment. Ameritech has stated that the initial deployment areas include an economically diverse population and has announced its commitment to deploy broadband services more widely in the future.[80] We will, however, condition this authorization on Ameritech's compliance with any requirements adopted subsequently in the video dialtone proceeding or any related proceeding.[81]

28. We reject Ameritech's proposal to allow any customer programmer to lease any unused channels after one year regardless of the number of channels previously leased.[82] This could allow a single programmer-customer to control so many channels that other programmers' access to the platform could be limited. In establishing our video dialtone policies, one of our primary goals has been to allow multiple programmer-customers to have access to the basic platform.[83] In the VDT Recon Order we specifically rejected the use of an "anchor programmer" that would have all or substantially all of the analog capacity of a system. We found such a concept would be inconsistent with the common carrier model and the requirement that video dialtone systems accommodate multiple programmers.[84] In light of Ameritech's commitments to expand analog capacity and to implement a shared channel mechanism, and the number of channels it plans to offer initially, we do not find that its proposal to allow one programmer to lease up to half of the available non-shared analog channels constitutes impermissible discrimination. We see no reason, however, to eliminate that limit after a specified time period, which could permit one programmer to control substantially all of the analog channels. Our concern with providing access to the basic platform to multiple programmers does not expire after the first year of

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79 See, e.g., Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911, modified, 101 FCC 2d 935, modified on recon. 102 FCC 2d 503 (1985).

80 Opposition at 18. See also Ameritech Opposition in RM-8491 at 4 (Ameritech has announced plans to pass approximately 6 million locations with Video Dialtone facilities by the end of the decade).

81 See CME Petition, supra note 56.

82 See Applications at 6.

83 See Video Dialtone Order at ¶ 2; VDT Recon Order at ¶ 30.

84 VDT Recon Order at ¶ 35.

operation of a video dialtone system. We understand Ameritech's concern that it may be economically wasteful to leave channels unused if there is not sufficient demand from additional programmer-customers.[85] If the situation were to arise that large numbers of channels were unused over an extended period of time, we would entertain a waiver motion from Ameritech to address that problem. We therefore condition authorization of the applications on Ameritech's limiting the number of analog channels a programmer may lease for exclusive use to no more than one half of the available non-shared channels.

29. The Illinois Commerce Commission's concern regarding Ameritech's failure to provide specific information regarding rates, terms and conditions of access to the platform does not require denial of these applications. We expect Ameritech's video dialtone tariffs will include the specific information the Illinois Commision seeks. We will evaluate the adequacy of that information in the tariff review process.

30. Finally, for guidance to the parties in advance of the tariff review process, we note our view that the proposed one-year programming commitment contained in Ameritech's illustrative tariff appears to be unreasonable. One of the goals of our video dialtone policy is to increase the diversity of video programming available to the public.[86] The ability of programmer-customers to provide programming on a less than full-time basis or for less than a year is an essential means of achieving that goal. Ameritech argues that allowing part-time programmers will create churn, which will be viewed negatively by end-users. We do not find that argument persuasive. As NCTA points out, the cable industry has accommodated part-time users for years. Further, from the end-user's perspective, there is no difference whether Ameritech accommodates part-time programmers or those programmers obtain access through resale of channel capacity as Ameritech suggests. We will consider the reasonableness of any specific rate proposals or regulations for part-time programmers, such as requiring purchase of minimum time blocks, in the tariff review process.

B. Section 214 Issues

31. In the Video Dialtone Order, we determined that Section 214 of the Communications Act applies to telephone companies that seek authority to construct video dialtone facilities.[87] In order

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85 Applications at 6 n.13.

86 Video Dialtone Order at ¶ 1.

87 Id. at ¶ 72. See also VDT Recon Order at ¶¶ 136-140.

to grant an application for authorization under Section 214 the Commission must determine that a grant would serve the "public convenience and necessity."[88] Traditionally, the focus of the Section 214 review has been "to ensure that carriers prudently invest in equipment so as to avoid waste and unreasonably high rates" for telephone rate payers."[89] As part of the Commission's rules specifying the contents of Section 214 applications, Subsection 63.01(m) requires the applicant to provide an "[e]conomic justification for the proposed project including . . . estimated added revenues and costs and the basis thereof."[90] The courts have granted the Commission significant latitude in making its determinations under Section 214.[91] In the Video Dialtone Order, we concluded that our existing safeguards against discrimination and cross-subsidization in the provision of basic services by local telephone companies, in conjunction with the additional protection of a first level non-discriminatory video dialtone platform, should effectively protect against potential anticompetitive conduct by telephone companies in their provision of video dialtone. We further stated, however, that we intended to "reassess" the adequacy of the safeguards as applied to Section 214 applications for specific video dialtone systems.[92]

1. Comments

32. In the applications, Ameritech asserts that its showings are completely consistent with the requirements for economic justification set forth in Section 214. Ameritech asserts that it will account for the investment and expenses associated with the

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88 47 U.S.C. 214(a).

89 American Telephone and Telegraph, FCC 86-87 (released March 10, 1986) (AT&T Authorization).

90 47 C.F.R. § 63.01(m)

91 Century Federal, Inc. v. FCC, 846 F.2d 1479, 1481 (D.C. Cir. 1988) (Century Federal). See also General Telephone Company of the Southwest v. U.S., 449 F.2d 846, 846 (5th Cir.1971) (General Telephone Co. of the Southwest), In FCC v. RCA Communications Inc., 346 U.S. 86, 96-97 (1953), the Supreme Court stated that the Commission need not "make specific findings of tangible benefit" or find "a demonstration of . . . immediate benefit to the public." However, the court continued, "[T]he Commission must at least warrant . . . that competition [resulting from the grant] would serve some beneficial purpose."

92 Video Dialtone Order at ¶ 89. See also VDT Recon Order at ¶ 136, 141-142.

proposed facilities in accordance with Parts 32 and 64 of our rules, as well as any rules we may prospectively deem necessary in subsequent proceedings.[93] In the economic analysis originally submitted with its applications, Ameritech projected a discounted payback period of seven years for all of the proposed projects. In its response to staff questions, Ameritech refined its economic and financial estimates, and now projects a discounted payback period ranging from seven to nine years for the projects.[94] Ameritech claims that such a payback period is reasonable for this type of capital-intensive project.[95] In its response to staff questions, Ameritech also re-estimated the net present value of revenues minus costs in the tenth year of operation for each of the projects, which range from $6.6 million in Indiana to $22.2 million in Illinois.[96] Ameritech also provided a breakdown of revenue by service class for each application.[97]

33. The petitions to deny argue that Ameritech has failed to file sufficient information about the projected revenues and costs of its proposed video dialtone systems. Joint Petitioners, for instance, assert that the proposal is so vague as to be facially deficient.[98] Similarly, GLCC maintains that the applications fail to provide specific information regarding costs, demand, and projected revenue.[99] It also asserts that Ameritech's revenue and payback projections are insufficient and unrealistic.[100] Several parties

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93 Applications at 14.

94 Response Letter at Attachment 1. Ameritech estimates that the discounted payback period will be seven years for Indiana, eight years for Wisconsin, and nine years for the other three proposed service areas.

95 Second Response Letter at p. 14, Attachment D (Statement of Larry F. Darby).

96 First Response Letter, Attachment 1. In the applications Ameritech estimated the range to be from $25.4 million in Indiana to $83.8 million in Illinois. Applications, Exhibit G.

97 First Response Letter, Attachment 2. The service classes listed are analog multicast, digital multicast, switched digital (residential), end-user connection, and switched digital (commercial).

98 Joint Petition at 4-8.

99 GLCC Petition at 34-37.

100 Id.

also criticize Ameritech's revised payback period and current value estimates in its response to staff questions.[101]

34. Joint Petitioners also argue that the Commission should not approve Ameritech's application until completion of a final evaluation of the data gathered in the various video dialtone trials and establishment of an appropriate permanent regulatory structure for common carrier video dialtone.[102] Joint Petitioners also advocate that the Commission initiate a comprehensive rulemaking proceeding to promulgate specific rules and procedures before approving any Section 214 applications. As envisioned by Joint Petitioners, such a rulemaking would necessarily include cost allocation rules and creation of a Joint Board to establish rules for jurisdictional separations.[103] Joint Petitioners assert that, at a minimum, critical issues of cost allocation, jurisdictional separations, and necessary safeguards to prevent unfair and improper cross subsidization were left unresolved in the Video Dialtone Order and must be addressed in each Section 214 application. Joint Petitioners maintain that Ameritech has failed to address these issues sufficiently in its application and, accordingly, the application must be dismissed.[104]

35. In its Opposition, Ameritech asserts that these arguments are spurious or misinformed, or both. Ameritech responds that its use of a separate facility for video dialtone services limits the possibility for cross-subsidization and separations problems.[105] Ameritech further contends that the safeguards currently in place and the combined oversight of both state and federal regulators are adequate to prevent anticompetitive activity on its part and will protect both intrastate and interstate ratepayers.[106]

36. Several parties object that the estimates of revenue per subscriber in the applications are unrealistically high.[107] Ameritech responds that these objections are based on numbers

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101 See e.g. Ad Hoc Response at 2; NCTA Response at 3-4.

102 Joint Petition at 4.

103 Id. at 8-10.

104 Id.

105 Opposition at 9-13.

106 Id.

107 E.g., GLCC Petition, Declaration of Patricia Kravtin at 11-12; Ad Hoc Response at 7.

derived from incorrect assumptions.[108] Ameritech also argues that it is inappropriate to compare its revenue figures with those for traditional cable systems since its video dialtone system will provide consumers with services not yet available on traditional cable systems.[109] Furthermore, the system will provide services to commercial customers not currently served by traditional cable systems. In its Second Response Letter Ameritech provides a detailed analysis of why it believes its revenue projections are reasonable.[110]

37. Ameritech also maintains that the various commenters are arguing for a higher standard of economic justification than is warranted. Ameritech argues that the pro-competitive nature of video dialtone justifies less specificity than petitioners would require. Ameritech also observes that the current regime of price caps would prevent an increase in rates for other interstate services if video dialtone should fail to generate sufficient revenue.[111]

2. Discussion

a. Section 214 Legal Standard

38. In order to grant an application for authorization under Section 214 of the Communications Act, the Commission must determine whether a grant would serve the "public convenience and necessity."[112] Courts have found that this statutory standard "is to be construed so as to secure for the public the broad aims of the Communications Act,"[113] including the purposes expressed in Section 1 of the Communications Act.[114] Administration of this

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108 Second Response Letter at 1-2.

109 Id.

110 Id. at 3-10.

111 Opposition at 10.

112 47 U.S.C. § 214(a).

113 Western Union Division, Commercial Telegrapher's Union, A.F. of L. v. U.S., 87 F. Supp. 324, 335 (D.D.C. 1949), aff'd, 338 U.S. 864 (1949) (Western Union Division). See also Washington Utilities and Transportation Commn. v. FCC, 513 F.2d 1142, 1147 (9th Cir. 1976) (Washington Utilities).

114 Section 1 charges the Commission with the task of making available to the nation a "rapid, efficient, Nation-wide . . . communication service with adequate facilities at reasonable

standard is generally left to the Commission's discretion: "[I]t is entirely within the Commission's discretion to accept even a minimal showing of financial justification" for approval of a Section 214 application.[115]

39. In its analysis of the public convenience and necessity under Section 214, the Commission has usually focused on the "added" or "incremental" costs and revenues of the facilities for which authorization is sought. We have generally interpreted Section 214 to require some showing that the revenues expected from the proposed facility will at least cover these costs within some reasonable period of time.[116] The Commission orders interpreting our Section 214 rules also stress an examination of added costs.[117] The Commission has determined, for example, that "estimates of additional . . . costs . . . are the relevant costs to be considered," and that we will not take into consideration "sunk costs" or "embedded costs" already invested in existing facilities.[118]

40. Section 214 authorizations do not require the level of detail demanded by petitioners. For instance, in AT&T Authorization we stated that "[g]enerally the Section 214 proceeding examines cost only insofar as it is necessary to

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charges . . . ." 47 U.S.C. § 151.

115 Century Federal, 846 F.2d at 1481.

116 See, e.g., TRT Telecommunications Corporation, 46 FCC 2d 1042, 1052 (1974).

117 Section 63.01(m) of our rules expressly asks an applicant to state the added costs and revenues generated by the proposed project. 47 C.F.R. §63.01(m). Further, Section 63.01, which specifies the contents of a Section 214 application, repeatedly speaks in terms of an accounting of the "additional" facilities, costs, and revenues generated by the proposed construction. Subsection (e) speaks of facilities that "extend" or "supplement." Subsection (h)(2) inquires about "added channels of communication," and Subsection (i) asks about increased traffic loads. Subsection (k) specifically requests information on the labor and material costs of the proposed facilities, and for "added equipment cost and each other added cost to the applicant." Subsection (m) requires the "added revenues and costs and the basis thereof."

118 Policy to be Followed in Future Licensing of Facilities for Overseas Communications, 67 FCC 2d 358, 394 (1977); recon. granted in part, 70 FCC 2d 1348 (1978).

determine, on a prima facie basis, whether costs are so substantial relative to benefits that the public interest would not be served by construction of the project."[119] Nor have we required the level of certainty demanded by petitioners. We have only required a finding that the estimates "do not appear unreasonable."[120] In examining an application for cable channel service, rather than denying the application, the Common Carrier Bureau conditioned its grant on a separate accounting of costs so that shareholders and not ratepayers would bear the burden of failure.[121] In the early stages of the domestic satellite market, we stated that "[i]f a carrier waited until it was sure of a large demand for traffic, few stations would ever be built, while initial service demands go unsatisfied."[122]

41. Finally, the Commission's review of a Section 214 application is not restricted merely to the financial aspects of the application. As stated above, the range of the Commission's inquiry into the "public convenience and necessity" is at least as broad as the purposes of the Communications Act. In situations such as this, where the applicant proposes a new service and thus must necessarily rely on predictions of demand and revenues, which

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119 AT&T Authorization at ¶ 7.

120 In AT&T, I-P-C-8542-1, P-C-6920, 49 FCC 2d 583 (1974), we found that, since it appeared that the cost increase proposed was "not unreasonable for the amount of diversity afforded, the authority requested by AT&T in this regard is granted." Id. at 587. In Pacific Bell, which involved common carrier construction of broadband transmission facilities for the holder of a non-exclusive cable franchise, the Common Carrier Bureau found that "[t]hese estimates do not appear unreasonable . . . . Century has not presented evidence warranting a finding that Pacific's request is prima facie unjustified or that a hearing is necessary." 60 RR 2d 1175, 1180 (Com. Car. Bur., released July 22, 1986), recon. denied, 2 FCC Rcd 265 (1987), aff'd sub nom. Century Federal, supra. See NJB Bell Order at ¶ 29.

121 Wisconsin Bell, 56 RR 2d 1262, 1267 (Com. Car. Bur. 1984) (Wisconsin), application for review denied, FCC 84-618 (released Dec. 13, 1984), recon. den. FCC 85-348 (released July 11, 1985). The Bureau concluded there that the applicant's estimate was not "so suspect that it requires further investigation," and that the projections "do not appear unreasonable." Id., 56 RR 2d at 1267.

122 American Satellite Corp., 65 FCC 2d 279, 288 (1977), aff'd sub nom., Hawaiian Telephone Co. v. FCC, 589 F.2d 647 (D.C. Cir. 1978).

by their very nature are cannot be certain, the Commission has found that public interest benefits to be gained from the new technology may nonetheless support a grant of a Section 214 application.[123] Thus, in AT&T, where the applicant proposed supplementing existing facilities with a fiber lightguide cable, the Commission stated that "[t]his experience is necessary to foster the technological developments that will lead to 'learning curve' decreases in cost. Without experience in the early stages of development we may never see some of the advances that fiber technology promises to bring to telecommunications users."[124] In Washington Utilities, the Commission considered the "public need and demand for the proposed facilities and services and for new and diverse sources of supply."[125] On appeal the Ninth Circuit stated: "The crucial question is whether the Commission acted within its statutory authority in adopting a general policy favoring entry of new carriers rather than considering the costs and benefits of the specific proposal in each application. We hold that the Commission did act within its authority."[126]

b. Application of Section 214 Standard to Ameritech Applications

42. We conclude that a conditioned grant of the Ameritech applications will serve the public convenience and necessity and thus satisfy the requirements of Section 214. We find that Ameritech's showings of economic justification satisfy the requirements of the statute and our regulations. Our statutory finding is premised as well on the public interest benefits we find in the construction of the video dialtone systems and on our imposition of conditions in this authorization for a separate accounting of the costs of the video dialtone systems. As part of our examination, we have reassessed the adequacy of our safeguards as applied to these specific Section 214 applications, and conclude that our existing safeguards, in conjunction with the conditions we impose on this authorization, will be sufficient to protect against possible anticompetitive conduct by Ameritech.[127]

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123 See AT&T, 84 F.C.C. 2d 303, 311 (1981).

124 Id. at 312.

125 Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142, at 1155 (1975).

126 Id. at 1161.

127 We note that, in addition to being under price cap regulation at the federal level, Ameritech is now regulated under a price cap plan in all five of the states in its service area. Letter from R. Notebaert, Ameritech, to R. Hundt, FCC (dated

(1) Economic Justification

43. We find that Ameritech's economic justification meets the requirements of Section 214 and our rules. Under Section 214, applicants are required to show that costs are not so substantial relative to the benefits that the public interest would not be served by the construction of the proposed video dialtone system. With respect to applications to provide video dialtone service, the applicant must describe the proposed facilities and the economic justification for their deployment, including information regarding projected costs and revenues and the assumptions underlying those projections.[128] We find that Ameritech has provided a reasoned basis for its determination that the revenues produced by its stand-alone video dialtone system will cover the cost of deployment within a reasonable time period.

44. Ameritech has submitted sufficient cost and revenue support for the Commission to grant the applications. For each application Ameritech has provided separate summaries of estimated construction costs, discounted pay-back periods, estimated revenues and costs by service class, a breakdown of the revenues by service class, net present values of revenues minus costs by year, annual costs for the projects, and annual operations and marketing expenses.[129] In its responses to specific staff inquiries, the company has also provided detailed analysis regarding the underlying assumptions reflected in these projections and an explanation of why they should be considered reasonable.[130]

45. Based on its market research, Ameritech projects an end-user subscription rate beginning at 9 percent and increasing to 39 percent within ten years.[131] It anticipates that by the tenth year overall penetration rates for video delivery services (e.g., cable television, direct broadcast satellites (DBS), video dialtone) will increase to 78 percent of homes passed. This is

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Dec. 1, 1994) at 1 ("Notebaert Letter").

128 See VDT Recon Order at ¶ 125.

129 Applications, Exhibit F; Response Letter at 4-5, attachments; Second Response Letter at 13-14. Ameritech also provided a breakdown of revenue by service class aggregated for all of the applications. Second Response Letter, Attachment A.

130 Response Letter at 1-2, 4-5. See also, Second Response Letter.

131 First Response at 3. One percentage point of the 39% is attributable to users of the commercial switched digital service. Id.

premised on a trend line for basic cable service forecasted by Paul Kagan which, extrapolated to the year 2003, shows a 73 percent penetration rate. Ameritech then factored in the effect of the introduction of competition, which it believes will stimulate penetration by an additional 5 percent, for a total of 78 percent.[132] It cites communities in which there is competition between cable companies to illustrate how such competition stimulates penetration and to show that over time both competitors will have roughly the same market share.[133]

46. Ameritech also argues that, given the unique services its video dialtone system will offer, penetration need not be an "either/or" proposition, but rather that some consumers will subscribe to both its system and a traditional cable system. Based on those factors, Ameritech states that it expects to obtain approximately one-half of the video programming subscription market within ten years.[134] Finally, Ameritech explains that its projected penetration rates take into account other video providers, such as DBS, but that these competitors are likely to gain only a very small market share in the areas Ameritech proposes to serve in the applications because these other providers generally do not offer the array of services that will be available over the video dialtone network.[135] We find that Ameritech has provided a reasoned basis for its projections of penetration levels for its video dialtone systems.

47. Based on these market penetration projections, Ameritech states that it will have a positive cash flow in Illinois by its fourth year of operation and by the third year of operation in the other four states.[136] Ameritech estimates that for the first few years of operation most of the revenue from its video dialtone platform will be generated by transport charges for analog multicast services. This service is analogous to existing cable service. As time passes, Ameritech expects that more end-users will use switched digital services, which include video on demand and interactive services.[137] By the tenth year of operation,

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132 Second Response Letter at 11.

133 Id. at 11-12, Attachments B and C.

134 Id. at 12.

135 Id. at 12-13.

136 First Response Letter, Attachment 1.

137 See Second Response Letter at 5.

Ameritech anticipates that analog multicast, residential switched digital, and commercial switched digital will provide approximately the same revenues.[138]

48. Ameritech estimates monthly revenue of $12 per residential subscriber for analog multicast services.[139] Ameritech notes that this is less than the $15.77 cited by GLCC as the portion of an average monthly subscriber charge for cable service that is devoted to transport.[140] The estimated revenue per residential subscriber for all services -- analog and digital multicast plus switched digital -- is $25 per month in the tenth year of operation.[141] This revenue estimate does not seem unreasonable given the current revenues for cable service and the projected consumer demand for video on demand and interactive video.[142] Ameritech notes that cable subscribers currently rent almost 5 movies a month in addition to their cable service.[143] In the Video Dialtone Order, we also recognized the potential market for such services.[144]

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138 In the tenth year of operation Ameritech anticipates that its revenues will be approximately $54 million from analog multicast, $57 million from residential switched digital, and $59 million from commercial switched digital services. In addition, anticipated revenues from digital multicast services are $16 million and from end user connection charges $14 million. Second Response Letter, Attachment A.

139 This cost includes the transport charges that will be assessed to the programmer-customer and the end user connection charges. Second Response Letter at 3.

140 Second Response Letter at 3, citing GLCC Petition, Declaration of Patricia D. Kravtin at 11.

141 Second Response Letter at 5.

142 A recent publication by NCTA found the average monthly rate for basic cable service to be $20.06 in 1993. NCTA, Cable Television Developments, Fall 1994, citing Paul Kagan Associates, Inc., Cable TV Financial Data Book, June 1994, at 9.

143 Second Response Letter at 5 n.2 citing Link Resources 1993 Home Media Consumer Survey.

144 There is "substantial evidence of potential demand for technologically advanced telephone company participation in the video market," and that "the potential demand for video network capabilities is evidenced by the growing interest of educational, medical, governmental and business institutions."

49. The Commercial Switched-Digital service will provide new and innovative services to Ameritech customers.[145] Consequently, it is difficult to find comparable services from which to derive revenue estimates, and there is greater uncertainty inherent in these projections. We find, however, that Ameritech has provided a detailed explanation of these services as well as a reasoned basis for its estimates. Commercial Switched-Digital services would include such offerings as interactive training and education, interactive shopping, news and information on demand and electronic publishing.[146] One example given by Ameritech is a service that would enable a real estate agent to give video tours on demand of homes for sale in areas outside the agent's and customer's community.[147] Ameritech estimates that its average revenue from commercial subscribers would be $390 per month or $20 per business day in the tenth year of operation.[148] Ameritech argues that this amount is reasonable, among other reasons, because it reflects that, for each commercial subscriber paying that amount, there may be many individuals at that location that use the service. In the real estate example, all the agents would be able to use the service, so the cost per agent could be substantially less than the $20 per day. Ameritech also argues that the use of these services would be economical for businesses. It illustrates that point by comparing the cost of a month of such service for a business to the cost of a single business or training trip that may be saved by using the service.[149] Given this explanation by Ameritech, we ~~do not~~ find that Ameritech has provided a reasoned basis for its estimate of $390 per month as an average revenue per commercial subscriber in the tenth year of operation.

Video Dialtone Order at ¶¶ 22-24.

145 As described by Ameritech, its Commercial Switched-Digital services would offer customers a wide range of new services, including on demand multimedia training and interactive shopping and transactions. Second Response Letter at 6-9.

146 Second Response Letter at 6-7.

147 Id. at 9.

148 Ameritech is assuming there are 20 business days per month. Id. at 8.

149 Ameritech states that it would cost far in excess of $390 per month to transport an employee in a remote location to a training course. Id. at 8.

50. Ameritech's discounted payback period for these video dialtone systems is based on the uses of a 10.6 percent discount rate.[150] The petitioners argue that this rate is too low for a new and risky service such as video dialtone.[151] Ameritech argues, on the other hand, that the rate represents the actual cost of capital to Ameritech in the financial markets and represents a weighting of the debt interest and equity return requirements based on the total operations of the company. It further argues that this rate is appropriate since debt and equity obligations are undertaken by the company as a whole, and investors evaluate risk and associated return based on the total risk structure of the company, not just a particular service.[152] Ameritech also states that its video dialtone operations would have a positive net present value in their tenth year of operation in each state even using much higher discount rates.[153] In the NJ Bell Order, we found a discount rate equal to the current rate of return used by the Commission, 11.25 percent,[154] was not unreasonable for video dialtone.[155] Using the 11.25 percent discount rate applied in the NJ Bell Order the discounted payback periods for the Ameritech applications would be seven to nine years. For the reasons stated in the NJ Bell Order, we decline to require Ameritech to use a discount rate higher than 11.25 percent.[156] The discounted payback periods -- whether using a 10.6 or 11.25 percent discount rate -- are not unreasonable for such a capital-intensive project.[157]

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150 The discount rate is the rate of interest (or rate of return) used to discount expected future revenues or expenses. The discount rate enables one to calculate the net present value of future income or expense streams.

151 Ad Hoc Response at 7; GLCC Response at 11.

152 First Response Letter at 6.

153 Ameritech states that the net present value would reach zero with a discount rate of 23.5 percent in Michigan, 15.2 percent in Ohio, 23.5 percent in Indiana, 19.0 percent in Illinois, and 21.4 in Wisconsin. Second Response Letter at 13.

154 Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, ¶ 1 (1990) (Rate of Return Order).

155 NJ Bell Order at ¶ 35.

156 Id.

157 See Second Response Letter, Attachment D (Statement of Larry F. Darby).

51. Without endorsing either Ameritech's specific cost and revenue figures or its projected break-even estimates, we conclude that Ameritech has made an adequate showing of the reasonableness of its estimated costs and revenues, sufficient to satisfy the economic justification requirements of Section 214.[158] Ameritech's figures reasonably compare to a known current market, the home video market, and that market has demonstrated a consistent demand for video services, as evidenced by the success of the cable industry. Ameritech has also presented evidence of the potential for revenue relying on other non-cable related video information services. In all, Ameritech has clearly presented estimates and other evidence that "do not appear unreasonable,"[159] and therefore meet the requirements of Section 214. Finally, as described below, we will require Ameritech to account separately for its video dialtone costs.

(2) Public Interest Benefits of The Proposed Video Dialtone Systems

52. In finding that video dialtone is in the public interest, the Commission concluded that video dialtone service would eliminate unnecessary regulatory barriers to competitive entry and to investment by telephone companies.[160] The elimination of those barriers will help achieve three important goals: (1) facilitating competition in the provisions of video services; (2) promoting efficient investment in the national telecommunications infrastructure; and (3) fostering the availability to the American public of new and diverse sources of video programming.[161] We believe the projects proposed by Ameritech will provide these benefits.

53. Ameritech's proposals clearly will produce new investment in an advanced telecommunications infrastructure. The proposed broadband analog and digital networks capable of providing at least 390 video channels would bring advanced technology to over a million locations in Ameritech's service area. Video servers, video administration modules, remote access modules, host digital terminals, multi-subscriber optical network units and associated

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158 In NJ Bell Order, the Commission found that a proposed video dialtone project with a six year projected break-even date meet the requirements of Section 214. 9 FCC Rcd 3677 at ¶¶ 36-37.

159 AT&T, I-P-C 8542-1, P-C-6920, 49 FCC 2d at 587; Pacific Bell at 1180.

160 VDT Recon Order at ¶ 3, 16.

161 Id. See also Video Dialtone Order at ¶ 9.

software are among the advanced infrastructure components under development. Investment in these components benefits the nation in several important ways. Such investment stimulates manufacturing of high technology products, increases employment opportunities, creates potential export markets, and provides many indirect benefits in other fields, including marketing and training.

54. The proposals also promise to bring additional competition in the distribution of video services. Creating new outlets and opportunities for programmers and other users of system capacity will result in many of the same kinds of economic benefits that arise from investments in advanced infrastructure. These include employment opportunities in information services, potential export opportunities, and secondary stimulative effects on supporting services and industries.

55. Ameritech also states that all five of the states in its operating region currently allow competition for local exchange service.[162] In the VDT Recon Order, we stated that the extent to which the states in which the service is proposed authorize competition for local exchange services is one of the factors which we may consider in the Section 214 review process.[163] In that regard, we note that new entrants, including cable companies, have begun or announced their intentions to provide local exchange service in Illinois, Michigan, and Ohio.[164] For example, MCI Metro recently filed applications with the Public Utilities Commission of Ohio to provide local service for businesses in Cleveland and Columbus.[165]

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162 Letter from R. Notebaert, Ameritech, to R. Hundt, FCC (dated Dec. 1, 1994) at 1 ("Notebaert Letter"). See also NARUC Report of the Status of Competition in Intrastate Telecommunications at 46, 52, 80 and 183 (Sept. 1994).

163 VDT Recon Order at ¶ 142.

164 See, e.g., "Dial C for Local Competition in Phone Market," Los Angeles Times, p. B5 (Oct. 18, 1994) (Teleport Communications Group to team with Tele-Communications, Inc and Motorola to offer local phone service in Chicago); "NCTA Takes Up Battle With States, Multichannel News, p. 1 (Oct. 17, 1994) (Michigan Public Service Commission granted U.S. Signal Corp. permission to provide local exchange service in Grand Rapids). See also Notebaert Letter at 2.

165 "MCI Widens Local Effort," New York Times, p. D3 (Dec. 22, 1994); "MCI Asks State Panels For Clearance to Sell Local Phone Service," Wall Street Journal, p. B6 (Dec. 22,1994).

56. Finally, the proposals will give consumers in the affected areas additional choices. Ameritech states the systems will offer a minimum of 390 channels. While we, and Ameritech, can anticipate the likely and potential uses of system capacity, there is no way of knowing which of these choices end-users will find most attractive, nor of knowing what new choices will become available in five or ten years. The systems will offer multiple service providers open access to video dialtone platforms, and consumers access to those providers. This access is consistent with the nation's fundamental commitment to diversity and competition in the flow of ideas, not only with respect to entertainment but also with respect to education, health, and commerce.[166]

(3) Accounting Conditions and the Tariffing Process

57. We require Ameritech to account for all costs associated with its video dialtone service in accordance with Part 32.[167] In order to ensure that these costs are not borne by ratepayers of regulated services, and consistent with the requirements established in the VDT Recon Order, we condition this authorization on a requirement that Ameritech segregate all costs incurred in providing video dialtone service into two sets of subsidiary accounting records.[168] We require Ameritech to create a set of subsidiary accounting records that identify all revenues, investment, and expenses wholly dedicated to video dialtone, and another set of records that capture any revenues, investment, and expenses that are shared between video dialtone and the provision of other services. These subsidiary accounting records shall include the direct costs and overheads associated with video dialtone service. To ensure that these costs are not borne by ratepayers of other regulated services, we require Ameritech to segregate all costs incurred in providing video dialtone service into subsidiary accounting records and to assign these costs to the video dialtone service. Consistent with the requirements of the VDT Recon Order, if these costs are not recovered from future video dialtone services, they must be borne by shareholders rather than the ratepayers of other regulated services.[169] In addition, summaries of the subsidiary accounting records shall be submitted

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166 See Video Dialtone Order at ¶ 1; VDT Recon Order at ¶ 3. See also NJ Bell Order at ¶ 41.

167 See Applications at 14.

168 VDT Recon Order at ¶ 173.

169 VDT Recon Order at ¶¶ 2, 146-223.

to the Commission on a quarterly basis.[170] In the event that Ameritech wishes to offer local exchange and exchange access telephone services over this network, it must first submit and obtain approval of an accounting and cost allocation plan that is consistent with our then-existing rules.[171]

58. We also require Ameritech to account for the cost of non-common carrier and enhanced services or video customer premises equipment (CPE) in accordance with our rules, to the extent Ameritech offers such services. We conclude that Ameritech's proposed provision of these services and video CPE is consistent with the requirements contained in Section 63.54(d)(2) of our rules.[172] We require that, to the extent the non-regulated components of the expanded video dialtone service are not already covered by Ameritech's cost allocation manual (CAM), Ameritech must revise its manual to show how it intends to allocate costs of such components between regulated and non-regulated activities.[173] Any necessary revisions must be filed within thirty days after release of this Order, and sixty days before providing non-regulated services related to video dialtone. At a minimum, in its submission, we require Ameritech to list all accounts affected by its provision of non-regulated services associated with its video dialtone service, and also describe those services. All CAM revisions related to the service will be subject to public comment and Commission scrutiny. We emphasize that our decision here, and the conditions we attach to it, are without prejudice to and in no way constrain any action that we may take in later phases of the video dialtone proceeding or any other applicable rulemaking proceeding.

59. Moreover, our action in this proceeding in no way limits our ability to ensure, in the subsequent tariff review process, that Ameritech's tariffed rates, terms and conditions for video dialtone service are just and reasonable.[174] It is clear that consideration of costs in a Section 214 proceeding is distinct from

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170 See VDT Recon Order at ¶ 173.

171 See, e.g., U S WEST Communications, Inc., 9 FCC Rcd at 190, ¶ 31.

172 47 C.F.R. § 63.54(d)(2).

173 See 47 C.F.R. § 64.903(b) (CAM revisions must be filed with the Commission sixty days before non-regulated services are offered to subscribers).

174 See VDT Recon Order at ¶¶ 169, 207.

the examination of rates in the tariff review process.[175] As the Commission staff stated in a 1986 decision, "[a] detailed inquiry into tariff related matters ... would vitiate the distinction between tariff and facilities authorization procedures and would require the Commission to engage in duplicative processes."[176] Prior to providing service, Ameritech must file tariffs, and cost support information, which will be available for review.

60. We have determined that video dialtone service is a "new service" under our price cap rules,[177] which apply to Ameritech.[178] In the Part 69/ONA Proceeding, the Commission established pricing standards for new services ("the new services test") offered by companies subject to the price cap method of regulation.[179] In setting an upper bound for such services, the Commission adopted a "flexible cost-based approach to pricing new services."[180] Under this test, the Commission requires LECs introducing new services to submit engineering studies, time and wage studies or other cost accounting studies to identify the direct costs of providing the new service, absent overheads.[181] Recognizing that LECs may have an incentive to understate direct costs and overheads in order to set unreasonably low prices for video dialtone service, in the VDT

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175 All American Cables at ¶ 5.

176 AT&T Request for Authorization to Supplement Existing Lines, W-P-C 5560, Mem. Op. and Order (rel. March 10, 1986)(AT&T Authorization) at ¶ 8.

177 VDT Recon Order at ¶ 206.

178 In addition to being under price cap regulation at the federal level, Ameritech is now regulated under a price cap plan in all five of the states in its service area. See Notebaert Letter.

179 Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers, Report and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4525 (1991) (Part 69/ONA Order); second further recon. 7 FCC Rcd 5235 (1192) (Part 69/ONA Reconsideration).

180 Part 69/ONA Order, ¶ 38; Part 69/ONA Reconsideration, ¶¶ 2-3, & 6.

181 Part 69/ONA Order, ¶ 42; Part 69/ONA Order Reconsideration, ¶ 12. The evolution of the LEC price cap new services test and its application to video dialtone services is discussed in detail in the VDT Recon Order at ¶¶ 209-223.

Recon Order we required a more detailed and complete identification of direct costs, and a stronger justification for allocation of extremely low overheads, then we have generally required in other new services filings.[182] It is against these standards that we will judge the reasonableness of the tariffed rates Ameritech proposes for its video dialtone services.

IV. MOTION TO DISMISS

A. Comments

61. On November 21, 1994, NCTA filed a Motion to Dismiss the Ameritech applications. NCTA argues that Ameritech should have revised its applications in light of our decision in the VDT Recon Order, but failed to do so and thus should be dismissed.[183] NCTA makes three arguments to support its position. First, it claims that Ameritech should have revised its cost and revenue estimates because the VDT Recon Order recognized the possibility of state jurisdiction over some video dialtone services. Second, NCTA argues that Ameritech failed to provide enough financial information. Third, it states that Ameritech has not demonstrated that the proposed systems will provide access to all would-be programmers on an equal basis.[184] Ameritech responds that there is nothing in the reconsideration order that requires it to amend the applications or the Commission to dismiss them, and that NCTA is merely trying to further delay the deployment of video dialtone.[185] It claims that NCTA has raised the same arguments previously, and the Commission has rejected them.[186]

62. NCTA asserts that the cost information that Ameritech is required to provide under the Commission's rules was altered by the reconsideration order when the Commission modified its finding that

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182 VDT Recon Order at ¶ 216. We provided specific guidance about these requirements in that Order at ¶¶ 217-220.

183 NCTA Motion at 2. See also Adelphia Reply.

184 NCTA Motion at 2.

185 Motion Opposition at 2. See also Liberty Reply.

186 Id. at 2-3 citing NJ Bell Order at ¶¶ 28, 32; Southern New England Trial, WPC-6858 (rel. Nov. 22, 1994) at ¶¶ 20, 39. See also USTA Reply.

it has exclusive jurisdiction over video dialtone.[187] NCTA claims that Ameritech has attributed all of the costs of its proposed service to the interstate jurisdiction even though its Switched Digital services appear to be intrastate services.[188] NCTA argues therefore that Ameritech's applications are incorrect and should be dismissed.[189] Ameritech responds that there is neither a factual nor legal basis to conclude that, with the introduction of state regulation for certain video dialtone service, the financial analysis needed for its proposals must change. It argues that the costs and revenues of its proposed service remain the same regardless of whether it is regulated at the federal or state level.[190] NCTA replies that, in light of the Commission's decision in the VDT Recon Order to monitor and report on the impact of video dialtone on separations and intrastate rates, it makes sense for Ameritech to separate costs and revenues by jurisdiction.[191]

63. NCTA also argues that the reconsideration order adopted a standard for cost and revenue information higher than that of the original video dialtone policies and that Ameritech has failed to meet that new standard.[192] NCTA argues that, because video dialtone presents an integrated facility and interservice cross-subsidies are possible, the cost allocation issues are more difficult and thus the Commission needs more detailed information in determining if the applications are in the public interest.[193] Ameritech responds that the reconsideration order does not alter the revenue and cost information required. It argues that the standard the Commission will use in evaluating video dialtone applications was

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187 NCTA Motion at 5. In the VDT Recon Order we held that the Commission only has exclusive jurisdiction over interstate video dialtone services, which include services involving delivery of video communications that are part of a continuous stream of communication provided at least partially by means of radio waves. The states have jurisdiction over intrastate video dialtone services. VDT Recon Order at ¶ 121.

188 NCTA Motion at 4-6. See also NCTA Response at 7 (NCTA argued that the commercial switched digital service is an intrastate service and its costs and revenues should not be considered in evaluating Ameritech's applications).

189 NCTA Motion at 4.

190 Motion Opposition at 4-5.

191 Motion Reply at 9.

192 Id. at 8.

193 Id. at 7.

enunciated in the NJ Bell Order, and that it has met that standard.[194] It notes that its proposed system is not integrated but is solely for video.[195] Ameritech also states that it is subject to price cap regulation in all five of the states in its operating region and at the federal level, and that such price regulation prevents it from cross-subsidizing.[196] NCTA, however, claims that in the VDT Recon Order, the Commission did not adopt the standard used in the NJ Bell Order, and that the Commission actually conditioned the NJ Bell Order on New Jersey Bell's compliance with whatever standard might be adopted in the VDT Recon Order. It reiterates that the new standard is a more rigorous standard than that used previously.[197] It also argues that price cap regulation does not eliminate incentives for Ameritech to misallocate costs in order to underprice video services at the expense of local ratepayers.[198]

64. Finally, NCTA argues that Ameritech's proposed Common Channel Manager and the use of common channels is contrary to the requirement that a telephone company provide access to the platform on a nondiscriminatory basis, an obligation the reconsideration did not alter.[199] Ameritech notes that in the reconsideration order the Commission found channel sharing to be consistent with video dialtone and stated that it would not defer consideration of pending applications while it considers rules for channel sharing arrangements.[200] In its reply NCTA states that it is not opposed to channel sharing per se, but to arrangements where the telephone company is involved in determining which channels are shared.[201]

B. Discussion

65. Section 214 directs the Commission to look at the public convenience and necessity in considering whether to grant an

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194 Motion Opposition at 4-5.

195 Id. at 5.

196 Id. at 6-7.

197 Motion Reply at 4-5.

198 Id. at 7..

199 NCTA Motion at 12-17.

200 Motion Opposition at 9, citing VDT Recon Order at ¶ 274.

201 Motion Reply at 11.

application for authorization.[202] We do not agree with NCTA's assertion that we can only base our finding on the interstate aspects of the proposed video dialtone systems in evaluating Section 214 applications.[203] Section 214 does not set out specific requirements that the Commission must consider, but rather leaves the Commission "wide discretion" in deciding how to make its public interest determination.[204] Likewise, our rules implementing Section 214 refer to the public interest, convenience and necessity of the application and do not set out specific requirements for the economic information to be provided.[205] Rather the Commission has looked at the specific type of facilities to be provided in determining the exact nature of the information required.[206]

66. We believe that it is important to look at the unseparated costs and revenues of the proposed video dialtone systems to determine if the systems are in the public interest. Just focusing on the interstate portion may not provide the Commission with a complete picture of how the proposed systems will operate, the types of services they will provide, or how the public will be benefitted by the system. Many of the new and innovative services which can be made available to the public because of video dialtone, such as interactive capabilities, may well be intrastate services. Yet they may provide important public benefits and we would be remiss to ignore those aspects of the proposal when considering these applications. We therefore find that we have the authority under the Communications Act and under our rules and regulations to examine unseparated rather than interstate only costs and revenues in making our Section 214 determination.

67. We emphasize that our approval of Ameritech's Section 214 applications is not intended to preempt state commissions from disallowing from local telephone service rates any video dialtone-related costs that do not meet their own standards for inclusion in rates.[207] Moreover, our approval is consistent with precedent. In Iowa Network Access Division (INAD), the Common Carrier Bureau approved a Section 214 application for INAD to construct facilities

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202 47 U.S.C. §214(a). See para. 31, supra.

203 We note that NCTA did not cite court or Commission decisions to support its argument. See NCTA Motion at 4-6.

204 FCC v. RCA Communications, 346 U.S. 86, 90 (1953). See also Competitive Carrier Rulemaking, 85 FCC 2d 1, 41 (1980).

205 See 47 C.F.R. § 63.01.

206 See, e.g., American Satellite Corp., 65 FCC 2d at 288.

207 VDT Recon Order at ¶ 191.

to provide centralized equal access service, even though the applicant justified the construction in part with revenues it anticipated from intrastate service.[208] In authorizing the service, the Bureau recognized that the viability of the service depended on intrastate revenues, that the state of Iowa was examining the proposed service, and that state rejection of the service would fundamentally affect the Bureau's decision to approve the facilities. Accordingly, the Bureau conditioned its grant on state approval of the network without modifications that materially affect the relative amounts of interstate and intrastate usage. Similarly, we require as a condition of this authorization that Ameritech inform us within 30 days of any state action or requirement that fundamentally changes Ameritech's assumptions regarding its ability to recover the costs of its video dialtone system.

68. Regarding NCTA's other arguments regarding the financial information required for approval of these applications and the use of common channels, the petition does not present any arguments that were not raised in the previous pleadings on these applications. We have already discussed Ameritech's proposed use of shared channels,[209] and the level of review required for these applications under Section 214 and our rules.[210] We do not agree with NCTA that the VDT Recon Order changed the standard for reviewing the Section 214 applications. The passage which NCTA cites is a background section which describes the existing standard,[211] and did not establish a new standard. NCTA also cites our discussion of the type of information we will require for video dialtone tariffs.[212] The consideration of costs in a Section 214 proceeding is different from the examination of costs in the tariff review process.[213]

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208 INAD, 3 FCC Rcd 1468, 1473-74 (Com. Car. Bur. 1988), aff'd on recon. 4 FCC Rcd 3809 (Com. Car. Bur. 1989). Cf. American Telephone and Telegraph Company and Specified AT&T Communications Companies, 2 FCC Rcd 1716 (Com. Car. Bur. 1987) (Commission reviews forecasts for intrastate, as well as interstate circuits in application for blanket Section 214 certification).

209 See Section III A. 3, supra.

210 See Section III B, supra.

211 NCTA Motion at 6-7, citing VDT Recon Order at ¶ 125.

212 NCTA Motion at 8-9, citing VDT Recon Order at 216-220.

213 See NJ Bell Order at ¶ 43. See also All American Cables and Radio, Inc., File No. WPC-4990 (Com. Car. Bur., rel. May 7, 1986).

Consequently, we do not find our discussion in the VDT Recon Order of the level of information we will require in the tariff review process in any way changes the standard we will use in Section 214 proceedings. Therefore we do not find that NCTA's motion provides any reason to alter our findings. The motion is therefore denied.

V. CONCLUSION

69. We find that the video dialtone systems Ameritech has proposed in the applications will serve the public convenience and necessity. Ameritech has supplied the information necessary to demonstrate that its proposals are consistent with the goals set forth in the Video Dialtone Order and our rules. A prima facie case has been made for the reasonable long-term viability of the projects and sufficient safeguards have been imposed to protect against unreasonable discrimination. The public interest will be served by expeditious implementation of the projects. Our action here is without prejudice to any subsequent action that might be taken in response to tariffs filed for these projects, or in rulemaking or other proceedings.

VI. ORDERING CLAUSES

70. Accordingly, IT IS ORDERED that pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the applications of Ameritech (File Nos. WPC-6926, WPC-6927, WPC-6928, WPC-6929, and WPC-6930) ARE GRANTED to the extent indicated in this order. Ameritech is authorized to provide video dialtone service, within the geographic areas described in its applications.

71. IT IS FURTHER ORDERED that the petitions to deny filed by NCTA, Joint Petitioners, GLCC, and Ad Hoc ARE DENIED.

72. IT IS FURTHER ORDERED, that grant of these applications IS SUBJECT TO the following CONDITIONS:

a) That Ameritech file an amended Section 214 application to obtain Commission approval of the structure of any shared channel mechanism, such as its proposed Common Channel Manager, before implementing any such mechanism for any of the video dialtone systems authorized in this order.

b) That Ameritech file any necessary revisions to its Cost Allocation Manual (CAM) within thirty days after release of this Order, and sixty days before providing non-regulated products or services related to video dialtone. Ameritech must also list all accounts affected by its provision of non-regulated services associated with its video dialtone service, and must describe those services.

c) That Ameritech create two sets of subsidiary accounting records: one to capture the revenues, investments and expenses wholly dedicated to video dialtone, and the other to capture any revenues, investments and expenses that are shared between video dialtone and the provision of other services. Ameritech must file summaries of those records for public inspection with the Secretary of the Federal Communications Commission on a quarterly basis. Copies of those records must be also served on the Chief, Accounting and Audits Division, Common Carrier Bureau. We delegate to the Chief, Common Carrier Bureau, the authority to determine the content and format of these subsidiary accounting records as well as the quarterly reports. Ameritech is further required to keep subsidiary accounting records to identify by each Part 32 account the amount of all plant that is replaced (that is, no longer used and useful) as a result of the deployment of video dialtone plant. In the event that investments made pursuant to this authorization are not deemed used and useful or deemed not to have been prudently incurred in the provision of interstate services, the Commission reserves the right to disallow the recovery of any or all such expenditures from interstate ratepayers.

d) In the event that Ameritech wishes to offer local exchange and exchange access telephone service over the video dialtone network, Ameritech must first submit and obtain approval of an accounting and cost allocation plan that is consistent with Commission rules. We delegate to the Chief, Common Carrier Bureau the authority to review and approve the accounting and cost allocation plan submitted by Ameritech.

e) That Ameritech provide all video programmers access to the basic platform under the same terms and conditions and that Ameritech make all reasonable efforts to expand capacity in order to meet all reasonably foreseeable increases in demand. Furthermore, Ameritech shall report to the Chief of the Common Carrier Bureau, within thirty days of an anticipated capacity shortfall or within five days of denying any video programmer access to the platform due to capacity limitations, in whole or in part, and on the steps taken to expand the capacity of the platform so as to accommodate the increased demand.

f) That Ameritech may not allow any programmer to lease exclusive use more than one half of the available non-shared analog channels.

g) That Ameritech comply prospectively with any changes in our rules that result from rulemakings or from reconsideration of our Second Report and Order in CC Docket 87-266 or any other applicable rulemaking proceeding.

73. IT IS FURTHER ORDERED that the Motion to Dismiss filed by NCTA on November 21, 1994 IS DENIED for the reasons stated herein.

74. IT IS FURTHER ORDERED, pursuant to Section 214(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 214 (c), the grant of Ameritech's applications to provide video dialtone service is subject to the conditions provided herein, and is also subject to any Commission rules or orders that result from any existing or future proceeding or proceedings that address video dialtone cost allocations, jurisdictional separations, pricing and other issues. Failure of Ameritech to decline the authorization as conditioned herein within thirty-one (31) days from the release date will be considered formal acceptance.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX: Pleadings Filed

Applications:

Ameritech (Applications) [Citation for all five applications. If citing to particular application, the State name is cited.]

Petitions to Deny:

Ad Hoc Telecommunications Users Committee (Ad Hoc Committee Petition) [filed separately on each of the five applications]

Cablevision, Inc., Comcast Cable Communications, Inc., Jones Intercable, Inc. (Joint Petition) [filed separately on each of the five applications]

Great Lakes Cable Coalition (GLCC Petition) [filed consolidated petition]

National Cable Television Association (NCTA) [filed separately on each of the five applications]

Comments:

Illinois Commerce Commission (Illinois Commission) [filed only in WPC-6929]

Opposition to Petitions to Deny:

Ameritech (Opposition)

Replies to Opposition:

Ad Hoc (Ad Hoc Reply)

GLCC (GLCC Reply)

Joint Petitioners (Joint Petitioners Reply)

NCTA (NCTA Reply)

Response to CCB Letter:

Ameritech (Response Letter)

Comments on Response Letter:

Ad Hoc (Ad Hoc Response)

GLCC (GLCC Response)

NCTA (NCTA Response)

Response to Staff Inquiries:

Ameritech (Second Response Letter)

Motion to Dismiss

NCTA (NCTA Motion)

Opposition to Motion to Dismiss

Ameritech (Motion Opposition)

Reply to Opposition to Motion to Dismiss

Adelphia Communications Corp., Comcast Cable Communications, Inc, and Jones Intercable (Adelphia Reply)

Liberty Cable Company (Liberty Reply)

NCTA (Motion Reply)

United States Telephone Association (USTA Reply)

FCC 94-357

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115

Order

Adopted: December 30, 1994 **Released:** January 10, 1995

By the Commission:

I. INTRODUCTION

1. The Commission has received stay requests from the Personal Communications Industry Association (PCIA) and the Mobile and Personal Communications 800 Section of the Telecommunications Industry Association (TIA) with respect to the effective date of certain aspects of our recently adopted *Report and Order* in this docket, which completely revises Part 22 of our rules and goes into effect on January 1, 1995.[1] Specifically, PCIA requests that we stay implementation of the *Part 22 Order* with respect to (1) new application processing rules for 931 MHz paging, and (2) our policy prohibiting two Part 22 licensees from sharing a single transmitter. TIA requests that we stay implementation of Section 22.919 of our Rules, which requires manufacturers seeking type-acceptance of new cellular telephone equipment to use electronic serial numbers (ESNs) that cannot be altered once they are set by the manufacturer. For the reasons stated below, we have decided to (1) stay the effective date of the 931 MHz paging rules on our own motion pending resolution of previously pending petitions for reconsideration under the old 931 MHz rules, (2) grant PCIA's petition with respect to sharing of transmitters, and (3) deny TIA's motion.

[1] *Report and Order*, CC Docket No. 92-115, FCC 94-201, 9 FCC Rcd 6513 (1994) (*Part 22 Order*).

II. DISCUSSION

A. 931 MHz Paging Rules

2. In the *Part 22 Order*, we adopted new procedures for processing of 931 MHz paging applications, based on frequency-specific applications and use of competitive bidding to select licensees in the event of mutually exclusive applications.[2] We further stated that all 931 MHz applicants with applications pending when the new rules went into effect would be given 60 days from the effective date of the new rules to amend their applications in accordance with these procedures.[3]

3. The *Part 22 Order* provides that the new 931 MHz application procedures go into effect on January 1, 1995.[4] PCIA requests that we stay implementation of these procedures on the grounds that a substantial backlog of paging applications filed under the old rules continues to exist, and that significant confusion would result from attempting to process this backlog under the new procedures.[5] We do not address the merits of PCIA's petition at this time, however, but instead will temporarily stay implementation of the 931 MHz application procedures on our own motion.

4. Our temporary stay of the new procedures arises directly from our discussion of 931 MHz paging in the *Part 22 Order*. In the *Order*, we observed that certain paging applications that had previously been granted, denied, or dismissed under the old rules remained before us in the form of petitions for reconsideration and applications for review. We concluded that these pending petitions and applications for review should be decided, to the extent possible, under our existing paging rules, and instructed the Chief of the Common Carrier Bureau to act on them before the effective date of the new rules.[6] We further stated that if the Bureau or the Commission had not acted on these cases by January 1, 1995, we would stay the effect of new Section 22.541 of our Rules concerning 931 MHz applications and also stay the 60-day amendment procedure for all pending 931 MHz applications until these cases were resolved by order.[7]

5. Although we have endeavored to resolve all pending 931 MHz reconsiderations and applications for review by January 1, 1995, we have determined that additional time is required

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[2] *Part 22 Order*, para. 98.

[3] *Id.*

[4] *Id.*, para.112.

[5] PCIA Petition for Partial Stay at 4-5.

[6] *Part 22 Order*, paras. 98-99.

[7] *Id.*, para. 99 n.171.

to resolve certain of these cases.[8] Therefore, we are staying the effective date of new Section 22.541 of our Rules and the opening of the 60-day window for amendment of pending 931 MHz applications described above until further notice.[9] We also observe that under our *Third Report and Order* in GN Docket No. 93-252, Section 22.541 of the Rules is superseded by Section 22.131 as of January 2, 1995.[10] Therefore, this order also stays implementation of Section 22.131 as it applies to 931 MHz paging. In light of this action on our own motion, we conclude that action on PCIA's request to stay the effective date of the 931 MHz application processing rules is unnecessary for the time being. We therefore defer consideration of PCIA's petition until further notice.

B. Sharing of Transmitters

6. In the *Part 22 Order*, we stated that as a matter of policy, we intended to prohibit two or more Part 22 licensees from sharing a single transmitter.[11] This policy was established to address concerns that shared use of the same transmitter by two different licensees could raise questions regarding the control of and responsibility for the transmitter. In addition, we were concerned that outages of shared transmitters would cause wider disruption of service than outages of transmitters owned by a single provider.[12] PCIA requests that we stay implementation of this policy pending reconsideration on the grounds that (1) the policy was adopted without prior notice or comment in violation of the Administrative Procedure Act; (2) the Commission has previously authorized dual licensing of transmitters under Part 22 and continues to do so in the private services; (3) reversing this policy would cause irreparable harm to licensees and the public, particularly in rural areas where shared transmitters are used because it is not

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[8] We also note that since the *Part 22 Order* was adopted, responsibility for licensing of Part 22 services has been transferred from the Common Carrier Bureau to the newly established Wireless Telecommunications Bureau. We therefore delegate authority to the Chief of the Wireless Telecommunications Bureau to act on all pending petitions for reconsideration and applications for review of 931 MHz applications as described in paragraph 99 of the *Part 22 Order*.

[9] The stay of the affected rules is procedural in nature, and therefore is not subject to the notice and comment requirements of the Administrative Procedure Act. *See* 5 U.S.C. §§ 553(b)(A), 553 (d); Kessler v. FCC, 326 F.2d 673, 680-681 (D.C. Cir. 1963). Pursuant to 5 U.S.C. § 553(d)(3), we further conclude that good cause exists to stay these rules as of the adoption date of this Order, as the rules would otherwise go into effect on January 1, 1995. Until such time as the stay is lifted, our prior procedures for processing of 931 MHz applications remain in effect.

[10] *See Third Report and Order*, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, FCC 94-212, adopted August 9, 1994, released September 23, 1994 (59 Fed. Reg. 59945, November 21, 1994) (*CMRS Third Report and Order*), Appendix B at 13, 19.

[11] *Part 22 Order*, para. 71.

[12] *Id.*

economically feasible for licensees to provide service with separate transmitters.[13]

7. Section 1.429 (k) of the Commission's Rules provides that the Commission may stay the effective date of an order pending reconsideration by the Commission upon a showing of "good cause."[14] In evaluating whether good cause exists, we have used the criteria set forth in *Virginia Petroleum Jobbers Association v. F.P.C.* 259 F.2d 921 (D.C. Cir. 1958) as explained in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 F.2d 841 (D.C. Cir. 1977) (*Holiday Tours*). Under the *Holiday Tours* standard, the petitioner must demonstrate (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[15]

8. On review of the pleading, we are persuaded that PCIA has met the *Holiday Tours* standard for granting a stay. First, we conclude that PCIA has raised a serious question on the merits. As PCIA notes, we have allowed dual licensing of Part 22 transmitters in the past, and we continue to allow dual licensing in the private services. We are concerned that reversing this policy with respect to Part 22 services could result in inconsistent treatment of similar services, in violation of the principle of regulatory parity.[16] We are also concerned that prohibiting dual licensing could irreparably harm licensees and the public in rural areas where transmitters are often used on a dual-licensed basis because it is economically impractical to support separate facilities. On the other hand, a stay of the new policy will not cause harm to other parties to the proceeding or the public. Although we expressed concern in the *Part 22 Order* that use of shared transmitters could magnify the effect of disruptions of service, PCIA points out that outages are more likely to be detected and corrected if the transmitter is used and monitored by multiple licensees.[17] Finally, we believe that the public interest favors grant of a stay while we further review our policy regarding sharing of transmitters. For all of the above reasons, we conclude that implementation of our policy against dual licensing of transmitters should be stayed, effective as of the adoption date of this Order,[18] pending reconsideration of this issue.

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[13] PCIA Petition at 6-9.

[14] 47 C.F.R. § 1.429(k).

[15] *Holiday Tours* at 842.

[16] *See CMRS Third Report and Order*, paras. 4-14. We do not agree with PCIA's argument that the prohibition against dual licensing was not subject to notice and comment and therefore violates the Administrative Procedure Act. In fact, the proposal was noticed in CC Docket No. 94-46, which was consolidated with CC Docket No. 92-115 in the *Part 22 Order*. *See Notice of Proposed Rule Making*, CC Docket No. 94-46, 9 FCC Rcd 2578, 2580 (1994); *Part 22 Order*, para. 3.

[17] PCIA Petition at 8.

[18] *See* note 9, *supra*.

C. Cellular Electronic Serial Numbers

9. To combat the problem of cellular fraud, we adopted a new rule in the *Part 22 Order* requiring cellular telephone manufacturers to install unalterable electronic serial numbers (ESNs) in all new cellular telephone equipment for which type-acceptance is sought after January 1, 1995.[19] Specifically, the new Section 22.919(c) of the Rules provides that the ESN must be factory set and must not be "alterable, transferable, removable or otherwise able to be manipulated." The purpose of this requirement is to prevent the reprogramming of cellular telephones with unauthorized or "cloned" ESNs. In adopting this requirement, we stated that the new rule would not require modification or retrofitting of existing cellular equipment. We noted, however, that anyone who altered the ESN of a cellular telephone or who used such a telephone knowing the ESN was altered would be in violation of the Communications Act and our rules.[20]

10. On December 19, 1994, TIA filed a request for stay of Section 22.919(c) pending review of TIA's simultaneously filed petition for reconsideration.[21] TIA argues that requiring the use of unalterable or "hardened" ESNs will impose significant new costs on manufacturers and will cause customer dissatisfaction by preventing manufacturers' authorized agents from making routine repairs and upgrades of cellular equipment in the field.[22] TIA also contends that hardened ESNs are ineffective in combatting fraud and that the Commission should instead develop anti-fraud rules that rely on encrypted authentication methodologies currently being developed by the cellular industry.[23]

11. The Cellular Telecommunications Industry Association (CTIA) opposes TIA's motion for stay.[24] CTIA contends that TIA has failed to demonstrate that the rule is likely to be overturned on reconsideration or that irreparable harm would result from denial of a stay. Specifically, CTIA disputes TIA's contention that implementing the rule will impose unacceptable costs on manufacturers and cellular customers.[25] CTIA also argues that immediate implementation of the rule is essential to combat fraudulent "cloning" of ESNs, which costs the cellular industry approximately one million dollars a day. While CTIA acknowledges that the new rule will not prevent all fraud, it contends that it is an important weapon that will have a

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[19] *Part 22 Order*, para. 62.

[20] *Id.*

[21] TIA Motion for Stay at 1.

[22] *Id.* at 14-16.

[23] *Id.* at 10-13.

[24] CTIA Opposition to Motion for Stay at 1.

[25] *Id.* at 3-4.

significant effect even as the industry develops other anti-fraud measures.[26]

12. On review of the pleadings, we conclude that TIA has not met the standard for granting a stay under *Holiday Tours*.[27] First, without prejudging TIA's reconsideration petition, we conclude that TIA has not shown that the petition is likely to prevail on the merits. In particular, TIA's argument that the Commission should adopt anti-fraud rules based on authentication procedures does not compel a stay of our ESN protection rules; instead, if TIA's alternative methodology proves effective, it offers a potentially complementary level of protection against fraud rather than a substitute for ESN regulation.

13. Second, we are not persuaded that either manufacturers or cellular customers will be irreparably harmed if the stay motion is not granted. The new ESN rule applies only to new equipment receiving type acceptance after January 1, 1995. Thus, manufacturers may continue to produce equipment under previous type-acceptances without being required to install hardened ESNs. Furthermore, the new rules will not make "in the field" equipment repairs impossible: as CTIA points out, authorized service centers may continue to make repairs that involve switching circuit boards with factory-set ESNs so long as they notify the carrier of the change.[28] Finally, we agree with CTIA that the cost of implementing the new rule must be weighed against the far greater cost of allowing ESN "cloning" to go virtually unchecked if the rule is not implemented.[29] We therefore conclude that TIA's motion for stay should be denied.

III. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that the effective date of new Section 22.541 of our Rules, the application of new Section 22.131 of our Rules insofar as it applies to 931 MHz paging applications, and the 60-day amendment procedure for all pending 931 MHz paging applications described in paragraph 98 of the *Part 22 Order* ARE STAYED, effective as of the adoption date of this Order, until further notice.

15. IT IS FURTHER ORDERED that action on the Petition for Partial Stay filed by the Personal Communications Industry Association on December 19, 1994, with respect to implementation of new 931 MHz processing rules IS DEFERRED until further notice.

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[26] *Id.* at 6-7.

[27] *See* para. 7, *supra.*

[28] CTIA Opposition at 6 n.11.

[29] Although TIA contends that the cost of implementing of the ESN rule could approach $30 million, it fails to specify how this figure was calculated, and we accord it little weight. *See* TIA Motion at 14. Even if we were to accept TIA's figure, CTIA estimates that cellular fraud costs the industry approximately $1,000,000 per day. CTIA Opposition at 6; Affidavit of Thomas McClure at 1. Thus, staying the rule for even a few months while reconsideration is pending could be more costly for the industry than the cost of implementing the rule as estimated by TIA.

16. IT IS FURTHER ORDERED that the effective date of the policy prohibiting two licensees from sharing a single transmitter, as described in paragraph 71 of the *Part 22 Order*, IS STAYED, effective as of the adoption date of this Order, until further notice.

17. IT IS FURTHER ORDERED that the Motion for Stay filed by the Mobile and Personal Communications 800 Section of the Telecommunications Industry Association on December 19, 1994, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
Petition for an Expedited	)
Declaratory Ruling	)
Filed by National Association	)
for Information Services,	)
Audio Communications, Inc., and	)
Ryder Communications, Inc.	)

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: December 30, 1994; Released: January 24, 1995

By the Commission:

I. Introduction

1. On January 22, 1993, we adopted a Memorandum Opinion and Order granting a petition for declaratory ruling filed by the National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc. (NAIS). NAIS asked the Commission to preempt the blocking requirements adopted by the South Carolina Public Service Commission (South Carolina or South Carolina PSC) for 900 "pay-per-call" telephone services available to subscribers in the state.[1] We found that 900 services provide important benefits to consumers and that by significantly encumbering the availability of 900 services, the South Carolina policy impedes federal policy. The South Carolina PSC filed a petition seeking reconsideration of the 900 Services Preemption Order.[2] In this order, we address the issues raised on reconsideration and, for the reasons set forth below, affirm our findings in the 900 Services Preemption Order. We believe that our decision in this order serves the public interest by promoting access to 900 pay-per-call services by all telephone subscribers and encouraging the growth of such services, while meeting the needs of consumers who would like to restrict their own access to 900 services.

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[1] See Petition for an Expedited Declaratory Ruling Filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc., 8 FCC Rcd 698 (1993) ("900 Services Preemption Order").

[2] Parties filing oppositions and replies in this proceeding are listed at Appendix A. We will treat comments filed by USTA entitled "Clarifications" as reply comments since they were filed before our reply comment deadline.

II. Background

2. On September 26, 1991, the Commission adopted the 900 Services Order, which established rules governing interstate 900 services.[3] The 900 Services Order requires that a local exchange carrier (LEC) offer its subscribers, where technically feasible, "an option to block interstate 900 services."[4] It requires further that LECs provide each residential subscriber "one opportunity to block 900 services upon request at no charge."[5] Under this blocking scheme, however, subscribers who do not affirmatively request blocking are able to make interstate 900 service calls. These rules promote our federal policy of maintaining and increasing the general availability of 900 services, so that consumers and businesses have "on the spot" access to a myriad of innovative communications and information services. At the same time, our rules secure the right of consumers who do not wish to use 900 services to select automatic blocking.

3. In February 1992, the South Carolina PSC established its own requirements for the provision of "all" 900 and 900-type services to subscribers in the state.[6] It required LECs to poll all existing subscribers, through billing inserts or a separate mailing, to determine whether they want access to 900 services. Under the Order, subscribers desiring access to 900 services must complete and return a ballot. If a subscriber does not return a ballot within a specified period, the South Carolina regulations require the LEC to block access to all 900 services from the subscriber's telephone line. The state regulations also would require LECs to offer new customers the option of blocking access to 900 services at the time service is established; new customers who do not indicate a choice would not have access to 900 services.

4. In October 1992, Congress enacted the Telephone

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[3] See Policies and Rules Concerning Interstate 900 Telecommunications Services, Report and Order, 6 FCC Rcd 6166 (1991).

[4] Id. at 6174, para. 47. See former 47 C.F.R. § 64.713 (now § 64.1508). Our blocking requirements apply only to 900 prefix services, not to other information services.

[5] Id. at 6175, para. 49. The order, however, permits LECs to charge residential subscribers a reasonable fee for subsequent requests to unblock or reblock. Id.

[6] See Proceeding to Establish Rules and Regulations for Provisioning of 900 and 900 Type Services Within the State of South Carolina, Order of the Commission, South Carolina Docket No. 91-034-C, Order no. 92-145 (February 27, 1992) ("Order").

Disclosure and Dispute Resolution Act.[7] That legislation codifies federal 900 service blocking requirements substantially similar to the blocking requirements established in the 900 Services Order.[8] The TDDRA also permits states to enact and enforce "additional and complementary oversight and regulatory systems or procedures, or both, so long as such systems and procedures govern intrastate services and do not significantly impede the enforcement of [the federal regulations] or other Federal statutes."[9]

5. On April 23, 1992, NAIS petitioned the Commission for expedited declaratory relief from the South Carolina PSC Order. In January 1993, we issued the 900 Services Preemption Order. In that order, we stated that 900 services offer valuable information and other benefits to consumers and that accordingly, federal policy does not permit LECs to implement automatic default blocking for interstate 900 services. We also found that it is not possible for carriers to implement automatic default blocking for intrastate 900 calls, as required by South Carolina, while complying with federal policy that prohibits such blocking for interstate 900 calls. We therefore concluded that implementation of the South Carolina "reverse blocking" requirements would thwart and impede our blocking policies for 900 calls.[10] Based on these conclusions, we preempted the South Carolina blocking requirements.

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[7] Telephone Disclosure and Dispute Resolution Act, Pub. L. No. 102-556, 106 Stat. 4181 (1992) (codified at 47 U.S.C. § 228 et seq. ("TDDRA"). The TDDRA establishes FCC authority over common carriers that provide the underlying transmission facilities for, or billing and collection services associated with, 900 services and Federal Trade Commission (FTC) authority over 900 service providers.

[8] See 47 U.S.C. § 228(c)(4). The sole difference between the Commission's requirements and the TDDRA is that the 900 Services Order provides residential subscribers with one opportunity to block 900 services at no charge, and subsequent opportunities to unblock and reblock for a fee, while the TDDRA establishes a one-time 60-day window in which any subscriber may elect blocking at no charge, and also provides new subscribers with a 60-day grace period to elect blocking at no charge.

[9] Id. at § 228(g)(4). On July 15, 1993, the Commission adopted regulations implementing the TDDRA. See Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Report and Order, 8 FCC Rcd 6885 (1993), recon., Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 94-200 (adopted Aug. 2, 1994).

[10] 900 Services Preemption Order, 8 FCC Rcd at 700-02.

III. Petition for Reconsideration

6. In seeking to overturn the 900 Services Preemption Order, South Carolina argues that this decision is at odds with both the Supreme Court's holding in Louisiana Pub. Serv. Comm'n v. FCC[11] and with the TDDRA. We address these arguments in turn below.

(1) Louisiana and Federal Preemption Authority

(a) Background/Petition

7. In the 900 Services Preemption Order, the Commission noted that in Louisiana, the Supreme Court set forth the legal standard for determining when preemption is consistent with Section 2(b) of the Communications Act.[12] In the 900 Services Preemption Order, the Commission determined that since LECs cannot determine whether a particular 900 services call is interstate or intrastate, carriers complying with the South Carolina automatic default blocking scheme would need to apply that scheme to both interstate and intrastate 900 service calls. It also found that to apply South Carolina's blocking policy to interstate calls would not be consistent with important federal objectives. The 900 Services Preemption Order thus preempted South Carolina's blocking policy in order to prevent the state from thwarting and impeding federal policy on consumer access to 900 services.

8. South Carolina asks us to reconsider and reverse this decision. As a threshold matter, South Carolina argues that federal preemption of its blocking requirements is beyond the

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[11] 476 U.S. 355 (1986) (Louisiana).

[12] 900 Services Preemption Order, 8 FCC Rcd at 700. While Section 2(a) of the Communications Act grants the Commission jurisdiction over "all interstate and foreign communications by wire and radio," Section 2(b) of the Act retains for the states "jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications by wire . . . ." 47 U.S.C. § 152(a), (b). See also California v. FCC, 39 F.3d 919 (9th Cir. 1994); Maryland Pub. Serv. Comm'n v. FCC, 909 F.2d 1510 (D.C. Cir. 1990); California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Texas Pub. Util. Comm'n v. FCC, 886 F.2d 1324, 1331 (D.C. Cir. 1989); National Ass'n of Regulatory Commissioners v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989); Illinois Bell Tel. Co. v. FCC, 883 F.2d 104, 116 (D.C. Cir. 1989); North Carolina Util. Comm'n v. FCC, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976); North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977).

Commission's lawful authority.[13] It contends that Congress has reserved to the states expansive authority to regulate intrastate communications under Section 2(b) of the Communications Act. According to South Carolina, the Louisiana decision stands for the proposition that states have authority not only over those matters that are intrastate in nature, but also over those matters that may be of mixed interstate and intrastate character. Mere inseverability of interstate and intrastate components, it claims, is not a basis for federal preemption.[14] South Carolina also contends that the Commission's determination that the South Carolina policy impedes federal policy is based on a "plethora" of unsupported statements regarding the balloting process required under the state's blocking requirements.[15]

(b) Comments

9. The National Association of Regulatory Utility Commissioners (NARUC) and the California Public Utilities Commission (California PUC) agree with South Carolina that the Commission should reconsider and reverse its decision to preempt South Carolina's blocking requirements for 900 services provided in the state.[16] NARUC supports South Carolina's interpretation of Louisiana, and argues that the Commission may not lawfully prohibit South Carolina from prescribing blocking requirements for carriers offering intrastate 900 services. It contends that Section 2(b) expressly prevents the Commission from preempting state authority over intrastate service "simply because such service shares network facilities also used for interstate services."[17]

10. NARUC and the California PUC also dispute the Commission's findings in the 900 Services Preemption Order that 900 services are jurisdictionally inseverable. They argue that the jurisdiction of 900 service calls can be ascertained because: (a) LECs know the origin of 900 service calls; (b) interexchange carriers know the final destination of 900 calls; and (c) information providers have the capability to identify both the

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[13] South Carolina PSC Petition at 4-7.

[14] South Carolina PSC Petition at 6; South Carolina PSC Reply Comments at 5.

[15] South Carolina PSC Petition at 9.

[16] See California PUC Comments at 1-6; NARUC Comments at 1-4.

[17] NARUC Comments at 3.

origin and destination of 900 service calls.[18] Based on these facts, the California PUC suggests that the Commission should require IXCs to inform originating LECs of the ultimate destination of 900 service calls so that LECs may identify calls as interstate or intrastate, and apply the applicable blocking rules.[19] NARUC contends that even if the record supports the Commission's position on inseverability of 900 services, the FCC must still "explain why a rule, which recognizes the distinct spheres of federal and state jurisdiction, similar to that adopted for dealing with jurisdictionally mixed private line services, could not be fashioned for 900 services."[20]

11. The majority of commenters oppose the petition for reconsideration and argue that it does not present any new facts or changed circumstances that would justify reversal of the 900 Services Preemption Order.[21] AT&T, NAIS, and Sprint contend that South Carolina has erroneously interpreted the standard for determining lawful federal preemption authority as articulated in the Louisiana decision. These parties assert that several courts have repeatedly upheld the Commission's power to preempt state regulation where the intrastate and interstate components of a service are inseverable and state regulation would impede federal policies.[22]

12. Several parties also challenge the California PUC's assertions that interstate and intrastate 900 service calls are

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[18] California PUC Comments at 2-3, NARUC Comments at 2. See also 8 FCC Rcd at 702 n. 51; Order on Reconsideration, CC Docket No. 91-65, FCC 93-88 at para. 28-29.

[19] California PUC Comments at 3-4.

[20] NARUC Comments at 2.

[21] See, e.g., AT&T Comments at 1-9; NAIS Comments at 1-5; Phone Programs Comments at 1-2; Sprint Comments at 1-9.

[22] See AT&T Comments at 3-5 citing North Carolina Util. Comm'n v. FCC, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976) (North Carolina I); North Carolina Util. Comm'n v. FCC, 552 F.2d 1036, 1044-50 (4th Cir.), cert. denied, 434 U.S. 874 (1977) (North Carolina II); Maryland Pub. Serv. Comm'n v. FCC, 909 F.2d 1510, 1514-15 (D.C. Cir. 1990); NAIS Comments at 2-3 citing Maryland Pub. Serv. Comm'n v. FCC; California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Sprint Comments at 4-5 citing North Carolina I; North Carolina II.

severable.[23] They argue that although the California PUC correctly identifies certain jurisdictional data available to LECs, IXCs, and information providers, it fails to mention that such data can only be compared and reconciled after a call is completed, not during the transmission of 900 calls.

(c) Discussion

13. We reject claims that we lack authority to preempt regulations of the South Carolina PSC that require LECs to implement automatic default blocking for 900 pay-per-call services offered in the state. We conclude that these services are not jurisdictionally severable for purposes of blocking intrastate 900 services, that the South Carolina policy thwarts and impedes valid federal policy, and that under Louisiana and subsequent federal circuit court decisions we have authority to preempt South Carolina's regulation of such services.

14. South Carolina argues that our decision to preempt its automatic default blocking rules violates Section 2(b) of the Communications Act, because Congress chose to reserve "to the states expansive authority to regulate intrastate communications."[24] This argument was considered and rejected in the 900 Services Preemption Order. We recognize, as South Carolina argues, that states have broad authority to regulate intrastate communications under Section 2(b) of the Act. We also recognize that what South Carolina refers to as "mere inseverability" of interstate and intrastate components is not by itself a sufficient basis for preemption. But these facts do not undercut in any way our decision to preempt here. Under the Supreme Court's decision in Louisiana, we have authority to preempt state regulation "where it [is] not possible to separate the interstate and intrastate components of the asserted FCC regulation."[25] Subsequent case law has clarified that this preemption standard is met when: "(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would 'negate the [FCC's] exercise . . . of its own lawful authority' because regulation of the interstate aspects of the matter cannot be

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[23] See e.g., AT&T Comments at 6; Sprint Reply Comments at 3-4; USTA Reply Comments at 1-3.

[24] South Carolina PSC Petition at 5.

[25] Louisiana, 476 U.S. at 375 n.4.

'unbundled' from regulation of the intrastate aspects."[26] Our analysis in the 900 Services Preemption Order is fully consistent with these tests. As discussed at length in the order, we concluded that South Carolina's blocking regulations would interfere with valid federal policies[27] and that 900 service calls are inseverable for purposes of blocking regulation.[28]

15. NARUC argues, further, that we may not base our preemption of state jurisdiction over intrastate services on the fact that those services rely on facilities used to provide interstate services. This argument mischaracterizes the basis of our preemption. We preempted the South Carolina regulations not simply because intrastate and interstate 900 services share facilities, but because the South Carolina rules are incompatible with our rules and the goals underlying them, and the service is inseverable for purposes of the regulations at issue.[29]

16. South Carolina and others argue, that even if our reading of Louisiana is correct, we have misapplied it because 900 service calls are not jurisdictionally inseverable for purposes of intrastate call blocking. In the 900 Services Preemption Order, we found, based on the record, that 900 service calls are jurisdictionally inseverable because local exchange carriers cannot determine during call transmission whether a particular call is

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[26] Maryland Pub. Serv. Comm'n v. FCC, 909 F.2d at 1515 citing Illinois Bell Tel. Co. v. FCC, 833 F.2d 104, 113 (D.C. Cir. 1989); NARUC v. FCC, 880 F.2d 422, 429, 430, 431 (D.C. Cir. 1989). See also California v. FCC, 39 F.3d 919 (9th Cir. 1994), pets. for cert. pending; Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp., 7 FCC Rcd 1619 (1992), aff'd mem. sub nom. Georgia Pub. Serv. Comm'n v. FCC, 5 F.3d 1499 (11th Cir. 1993).

[27] 900 Services Preemption Order, 8 FCC Rcd at 700-01, paras. 14-18.

[28] Id. at 702, paras. 20-21. To the extent that paragraph 12 of the 900 Services Preemption Order arguably can be read out of context to suggest that the Commission believed inseverability alone was a basis for preemption, we clarify that that was not our intent. Rather, as is clear from the order taken as a whole, we applied, as we consistently do in Section 2(b) preemption cases, the well-established legal test set forth in Louisiana and its progeny, including Maryland Pub. Serv. Comm'n.

[29] See id. at paras. 14-22.

interstate or intrastate.[30] Neither South Carolina nor California PUC presents any new evidence showing that this finding was erroneous. Some parties maintain that IXCs could inform originating LECs of the jurisdictional nature of each call and thereby permit selective blocking. In support of this assertion, these parties cite the fact that IXCs currently provide to LECs monthly reports of the percentage of interstate use ("PIU reports") for unmeasured access traffic. The PIU reports, however, are compiled by IXCs for billing purposes and are transmitted to LECs on a monthly, not real-time basis. If a LEC cannot determine the jurisdictional nature of a call at the time that it is placed, it could not block intrastate 900 service calls, pursuant to the South Carolina rules, while permitting access to interstate 900 services, pursuant to the FCC's rules. Thus we affirm our previous conclusion that interstate and intrastate 900 service calls are inseverable for purposes of blocking regulation.

17. We also reject NARUC's suggestion that we establish a blocking scheme similar to our rules for "jurisdictionally mixed private line service." Under those rules, a subscriber line is deemed to be interstate in nature for cost allocation purposes if the customer certifies that ten percent or more of the calling on that line is interstate. Although its argument is not entirely clear, NARUC appears to seek application of state blocking requirements to subscriber lines meeting a certain threshold of intrastate calling to 900 services. NARUC does not, however, explain how the percentage of interstate and intrastate 900 service calls could be calculated for each line, nor does it appear that any such calculation is feasible. Unlike private line service subscribers, 900 service users do not know the termination point -- and thus the jurisdictional nature -- of their 900 service calls. Therefore, individual subscribers could not be the source of jurisdictional usage information. Nor has anyone shown that it would be practicable to collect jurisdictional data for 900 calls from any other source on a line-by-line basis. Indeed, it would appear that such a rule would require collecting and compiling data on a line-by-line basis from either every carrier originating 900 service calls in South Carolina or every 900 service provider receiving calls from South Carolina. The burden imposed by any such requirement would be massive.

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[30] See 900 Services Preemption Order, 8 FCC Rcd at 702, para. 21. 900 calls are jurisdictionally inseverable because a 900 number (like an 800 number and unlike a plain old telephone service (POTS) number) does not in itself indicate the termination point of the call. The termination point is determined only after the number is translated into a POTS number. For interexchange calls, this translation is performed by the interexchange carrier. Therefore, the originating LEC cannot determine the jurisdictional nature of the call before "handing it off" to the IXC.

18. South Carolina also argues that the record does not support a finding that its blocking requirements impede federal policy. We disagree. The Commission's mandate under the Communications Act is to encourage the provision of new technologies and services to the public, including interstate 900 services.[31] Our rules advance this statutory objective by requiring LECs to provide customers with unencumbered access to 900 services unless an affirmative blocking request is made by the subscriber. These rules promote our federal policy of maintaining and increasing the general availability of 900 services, with their attendant benefits, while still ensuring that consumers who so desire can limit their own access to 900 services. The record in this proceeding and the 900 Services rulemaking proceeding demonstrates that 900 services offer consumers and businesses direct access to a myriad of innovative communications and information services. These services include live and recorded messages that provide stock quotes, travel information, product information, sports scores, up-to-the-minute weather forecasts, and a wide range of other offerings. That consumers value these services and that they can play an important role in the national economy is evidenced by the significant growth in 900 service calling in recent years. Our blocking policy strikes a reasonable balance between the public interest goals of encouraging the availability of these valuable services and preserving the right of individual consumers to restrict their own access to them.

19. By contrast, South Carolina's 900 policy strikes a very different balance. By requiring consumers to return a ballot in order to have access to 900 service offerings, South Carolina encumbers the availability of those services. This result is inconsistent and incompatible with federal policy.

20. We also reject as incorrect South Carolina's argument that our decision to preempt South Carolina's 900 blocking rules was premised on an assumed ballot response rate.[32] In the 900

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[31] 47 U.S.C. § 157. See also 47 U.S.C. § 151 (statutory purpose of "mak[ing] available, so far as possible to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities . . . .").

[32] In its petition, South Carolina argues that the Commission erroneously relied on the speculative assertions of two commenters that the state's regulations will result in the virtual unavailability of 900 services because most telephone subscribers will not return the ballots accompanying their telephone bill. South Carolina PSC Petition at 9-10. South Carolina contends that the Commission wrongly accepted the commenters' assertion as fact. Id. at 10.

Services Preemption Order, we found that under South Carolina's automatic default blocking regime, access to interstate 900 services is denied unless a consumer previously has affirmatively requested access. We also found that those consumers who have not made an election are denied the opportunity to make an "on the spot" decision to access 900 services, and that such a result unreasonably restricts consumer access to 900 services, which is inconsistent with our policy of making interstate communications services generally available.[33]

21. Finally, we believe that affirming our existing federal blocking policies will strengthen the national economy and serve the public interest by promoting broad consumer access to interstate 900 pay-per-call services. We believe that our decision in this order will have a positive effect on economic growth by enhancing, and removing impediments to, consumer access to the plethora of competitive 900 interstate pay-per-call services in the marketplace. Promoting access to these services encourages their growth, thereby spurring economic growth.

(2) TDDRA and the South Carolina Blocking Requirements

(a) Background/Petition

22. Section 228(g)(4) of the TDDRA grants states authority to enact and enforce "additional and complementary oversight and regulatory systems or procedures, or both, so long as such systems and procedures govern intrastate services and do not significantly impede the enforcement of [the federal regulations] or other Federal statutes." In the 900 Services Preemption Order, we concluded that South Carolina's requirements "significantly impede" enforcement of Commission policies under the Communications Act, and therefore are not "additional and complementary" to federal requirements within the meaning of the TDDRA.[34]

23. South Carolina contends that the consumer protection benefits resulting from its blocking scheme are additional and complementary to federal requirements and do not significantly impede enforcement of Commission policies under the Communications

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[33] See 900 Services Preemption Order at 700, para 18.

[34] 900 Services Preemption Order, 8 FCC Rcd at 702, n.54 citing Telephone Disclosure and Dispute Resolution Act, 138 Cong. Rec. S17120 (daily ed. Oct. 7, 1992) ("However, such regulatory procedures as the States may devise cannot thwart or impede other Federal policy objectives of the FCC, the enforcement of this section, or any other Federal statutes." Statement of Senator Inouye).

Act.[35] In addition, citing Sections 202(a) and 302(a) of the TDDRA, South Carolina argues that Congress authorized and endorsed the type of blocking requirements it has adopted.[36] It also adds that none of the TDDRA's specific blocking provisions contradicts its "reverse blocking" policy. Finally, South Carolina maintains that its "reverse blocking" regime has precedent in a previous FCC decision that requires reverse blocking for indecent communications by telephone.[37]

(b) Comments

24. The California PUC and NARUC support South Carolina's claim that its blocking requirements are consistent with

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[35] South Carolina PSC petition at 7-9.

[36] South Carolina PSC Petition at 8. Section 202(a) states:

> Whenever an attorney general of any State has reason to believe that the interests of the residents of that State have been or are being threatened or adversely affected because any person has engaged or is engaging in a pattern or practice which violates any rule of the Commission under section 201(a), the State may bring a civil action on behalf of its residents in an appropriate district court of the United States to enjoin such pattern or practice, to enforce compliance with such rule of the Commission, to obtain damages on behalf of their residents, or to obtain such further and other relief as the court may deem appropriate.

Section 302(a) states:

> This title does not annul, alter, or affect, or exempt any person subject to the provisions of this title from complying with, the laws of any State with respect to telephone billing practices, except to the extent that those laws are inconsistent with any provision of this title, and then only to the extent of the inconsistency. The Commission is authorized to determine whether such inconsistencies exist. The Commission may not determine that any State law is inconsistent with any provision of this chapter if the Commission determines that such law gives greater protection to the consumer.

[37] South Carolina PSC Petition at 9. See also Regulations Concerning Indecent Communications by Telephone, Report and Order, 5 FCC Rcd 4926 (1990).

the policies underlying the TDDRA.[38] The California PUC argues that the additional protections afforded consumers by South Carolina's blocking requirements further the underlying purpose of both the TDDRA and the FCC's 900 services regulations, which were adopted in response to abusive practices and/or unauthorized usage of 900 services. In addition, California states that since these blocking requirements do not prevent access to interstate 900 services or otherwise affect the enforcement of federal regulations governing interstate 900 services, they fit squarely within Congress' intent to permit states to enact and enforce "additional and complementary" oversight and regulatory measures.[39]

25. Parties supporting the Commission's preemption action argue that South Carolina's blocking requirements are not complementary to the TDDRA.[40] For instance, AT&T and Sprint contend that South Carolina's automatic default blocking regime is contrary to the federal policy of promoting access to interstate 900 services by permitting LECs to block access to interstate 900 services only upon an affirmative request. NAIS asserts that South Carolina's reliance upon Sections 202(a) and 302(a) of the TDDRA is misplaced since those provisions govern regulations adopted by the Federal Trade Commission (FTC), not the FCC. Finally, Phone Programs (PPI) claims that South Carolina's blocking restrictions "go beyond" the TDDRA's requirements because they are unreasonable and discriminatory, and thereby inconsistent with the TDDRA.[41] PPI also claims that the state blocking requirements amount to an impermissible presubscription arrangement.

(c) Discussion

26. We affirm our finding in the 900 Services Preemption Order that the South Carolina blocking requirements are not "additional and complementary" to federal requirements within the meaning of the TDDRA. We also reject South Carolina's contention that its blocking scheme is consistent with Sections 202(a) and 302(a) of the TDDRA.

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[38] California PUC Comments at 4-5; NARUC Comments at 2.

[39] California PUC Comments at 5. NARUC cites proposed legislation that was not adopted in 1991 (H.R. 328) as support for its argument that more restrictive state regulations that are consistent with the underlying purposes of federal requirements should not, as a matter of policy, be preempted by the Commission. NARUC Comments at 3.

[40] See, e.g., AT&T Comments at 6-8; NAIS Comments at 3-4; Phone Programs at 1-2; Sprint Comments at 5-6.

[41] PPI Comments at 1-2.

27. As discussed above, South Carolina's rules are significantly more restrictive than federal rules and would disserve the public interest by hindering rather than promoting the general availability of interstate 900 services. In the absence of evidence that our policy does not provide ample protection to consumers or that South Carolina's default blocking requirements can be implemented without significantly impeding our policy of encouraging access to interstate 900 services, we affirm our previous finding that South Carolina's blocking requirements are not "additional and complementary to" our existing policy on blocking interstate 900 services calls. We find that our policy strikes a reasonable balance between consumer protection and the rights of subscribers to access interstate 900 services. Accordingly, we affirm our conclusion that the public interest would not be served by additional restrictions on the availability of these services. Our finding, however, does not preclude South Carolina from exercising its lawful authority under the TDDRA to implement additional blocking regulations that would complement our existing rules.

28. We also find that South Carolina's reliance on Sections 202(a) and 302(a) of the 900 Services Act is misplaced. Both of these provisions relate to state authority vis-a-vis the FTC, and not the FCC. Thus, Section 202(a) authorizes states to file civil actions for violations of FTC regulations, while Section 302(a) authorizes states to supplement FTC billing regulations with stricter measures of their own. Neither provision has any bearing on the issue before us.

29. We also reject South Carolina's claims that our decision requiring reverse blocking for indecent communications by telephone lends support for its automatic default blocking requirements. As stated in the 900 Services Preemption Order, we established reverse blocking rules for indecent communications because those rules are based on the compelling governmental interest in restricting access by minors to indecent messages.[42] We are under no obligation to adopt similarly restrictive rules for 900 services generally. Nor are we under any obligation to defer to more restrictive state regulations regardless of the impact of those regulations on federal policy. As discussed above, the TDDRA permits "additional and complementary" state regulations, not regulations that significantly impede federal policy.

IV. Conclusion

30. For the reasons stated above, the petition for reconsideration is denied.

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[42] See 900 Services Preemption Order 8 FCC Rcd at 709, n.47.

V. Ordering Clause

31. Accordingly, IT IS ORDERED that the petition for reconsideration of the South Carolina Public Service Commission IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Party filing Petition

South Carolina Public Service Commission (South Carolina)

Parties filing Oppositions

American Telephone and Telegraph Company (AT&T)
National Association for Information Services (NAIS)
Phone Programs, Inc. (PPI)
Sprint Communications Company L.P. (Sprint)

Parties filing Supporting Comments

California Public Utilities Commission (California PUC)
National Association of Regulatory Utility Commissioners (NARUC)

Parties filing Reply Comments

South Carolina
Sprint
United States Telephone Association (USTA)

FCC No. 95-36

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Preparation for International Telecommunication Union World Radiocommunication Conferences	)))	IC Docket No. 94-31

SECOND NOTICE OF INQUIRY

Adopted: January 30, 1995 Released: January 31, 1995

Comment Date: March 6, 1995
Reply Date: March 21, 1995

By the Commission:

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I. INTRODUCTION

1. By this Second Notice of Inquiry (Second NOI), the Commission reviews comments and replies submitted in response to the Notice of Inquiry (Notice)[1] in this proceeding and reviews the recommendations of the WRC-95 Industry Adivisory Committee (IAC). It also seeks comment on preliminary proposals for the 1995 World Radiocommunication Conference (WRC) and future WRCs.

2. The International Telecommunication Union (ITU) will convene WRC-95 from October 23, to November 17, 1995, at its headquarters in Geneva, Switzerland. The agenda for the conference includes substantive topics such as facilitating the introduction of global mobile-satellite services (MSS) and simplifying the international Radio Regulations. It also includes further consideration of an agenda for the next conference, WRC-97, and drafting a preliminary agenda for WRC-99. Presentation of the Commission's preliminary views on these topics is intended to stimulate discussions and is part of an overall effort to achieve early consensus on U.S. proposals to WRC-95. The preliminary proposals described below are subject to modification, however, and the Commission's further development of its proposals will include consideration of comments received in response to this Second NOI and of additional recommendations of the IAC. The Commission's ultimate recommendations for U.S. proposals will be released in a Final Report prior to WRC-95.

II. BACKGROUND

3. World Radiocommunication Conference (WRC) Schedule. In the Notice,[2] we described the ITU's adoption (in conjunction with a major restructuring) of a four-year planning cycle for WRCs -- that are now to be convened every two years to consider radiocommunication matters of worldwide character, including frequency allocations and allotment plans.[3] Each WRC also develops, subject to the approval of Council, an agenda for the next conference and recommends a preliminary agenda for the WRC four years hence.[4] Thus, in addition to the substantive topics to be covered at WRC-95, U.S. proposals are now being developed to propose additional

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[1] Notice of Inquiry, IC Docket No. 94-31, 9 FCC Rcd 2430 (1994).

[2] Id. at 2430.

[3] See Article 4B, Convention of the ITU, Final Acts of the Additional Plenipotentiary Conference (Geneva, 1992).

[4] See Resolution No. 9, Final Acts of the Additional Plenipotentiary Conference, (Geneva. 1992).

items for the WRC-97 agenda and for the preliminary agenda of WRC-99, which could include initial views toward an agenda for WRC-2001.

4. Notice of Inquiry. This proceeding addresses technical and regulatory matters related to the agenda for WRC-95, and solicits information to assist the Commission in preparing cogent U.S. proposals for that conference. The initial Notice briefly reviewed the results of WRC-93 and its recommendations for WRC-95, including: review of the Radio Regulations based on the Final Report of the Voluntary Group of Experts (VGE); facilitating use of frequency bands allocated at WARC-92 to the mobile-satellite service (MSS); and review of other selected topics, including future agendas.[5] In the Notice we invited comment on these matters and also on certain procedural matters relating to ways in which the Commission might best structure its own processes to be responsive to industry needs and, in light of the ITU's new quadrennial conference planning cycle, to ensure timely and effective planning for future WRCs.

5. WRC-95 Industry Advisory Committee. Shortly after the release of the initial Notice, the Commission established the WRC-95 IAC to develop independent private sector proposals for consideration by the Commission in parallel with this proceeding.[6] The IAC, which is chaired by a member of the private sector and includes experts from industry, is comprised of six Informal Working Groups (IWGs) studying issues of regulatory procedures for coordination, MSS below 1 GHz, MSS above 1 GHz, MSS feeder links, space sciences, and future conference agendas. IAC and IWG meetings are announced by Public Notices and all interested members of the public are encouraged to attend. A preliminary version of the IAC Report was released on December 30, 1994, and its views have been incorporated here where appropriate.[7] The results of the IAC's work are being fully considered by the Commission which will, in consultation with the Department of Commerce's National Telecommunications and Information Administration (NTIA) and the Department of State, develop final U.S. proposals for WRC-95.

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[5] WRC Notice, at 2430.

[6] See Public Notice, Notice of Advisory Committee Establishment, released May 25, 1994; see also WRC Notice, at 2438.

[7] FCC Industry Advisory Committee for the ITU 1995 World Radiocommunication Conference Interim Report (IAC Interim Report), Dec. 30, 1994. The IAC Interim Report has been associated with the docket in this proceeding. See News Release, released January 30, 1995.

III. DISCUSSION

6. WRC-95 will be the first conference under the ITU's new conference planning cycle to discuss substantive spectrum allocation and regulatory matters. This conference represents a significant opportunity to build a foundation for advancing near and long-term United States telecommunications goals. In particular, WRC-95 is critical to a new commercial telecommunications industry -- the mobile-satellite services (MSS) industry, that includes low-Earth orbit (LEO) MSS systems.[8] LEO systems can provide voice, data and other services at relatively low cost and will be a critical component in achieving the Commission's goals of universal service, open access and competition in the provision of services. They will also be part of a new seamless, nationwide (and eventually global) communication network. The new MSS industry also promises to stimulate significant economic growth both domestically and abroad.[9] The proposals here are intended to facilitate implementing competitve MSS operations by easing international technical and regulatory constraints and providing additional spectrum allocations.

7. In addition to seeking comment on specific MSS proposals, we invite input on other subjects raised in the first Notice. These topics include: various space service allocation matters; review of Appendices 30 and 30A; availability of high frequency broadcasting bands (HFBC); the Final Report of the VGE; and agendas for WRC-97 and for the 1999 and 2001 WRCs.[10] Commenters should also consider the long-range planning aspects of the ITU's conference cycle -- the two-year WRC schedule and four-year WRC planning cycle. In that regard, parties should comment on topics not addressed in the first Notice, or here, that may be appropriate for conferences beyond WRC-97. Further comment is also sought on the Commission's conference preparatory methods in light of the ITU's new conference and planning cycle.

A. Mobile Satellite Service Issues

8. At WRC-95, the United States will have the opportunity to improve the use of existing MSS bands by eliminating technical, operational, and regulatory barriers; by making available adequate, useable feeder link spectrum to support MSS user links; and by adopting limited new MSS allocations. These measures should

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[8] See Report and Order in CC Docket No. 92-166, Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands (Big LEO Report), 9 FCC Rcd 5936 (1994).

[9] Id. at 5940-41.

[10] See WRC Notice, at 2431.

provide significant relief to MSS proponents worldwide. In the Notice, we solicited comment on these points without addressing specific details.[11] Identification of specific concerns was left to interested parties and the IAC. Since then, ITU Radiocommunication Sector (ITU-R) Task Groups 8/3 and 4/5, that addressed MSS and MSS feeder links respectively, have concluded their work and will report to the 1995 Conference Preparatory Meeting (CPM) technical and procedural bases for consideration of MSS issues at WRC-95.[12] For each major issue, discussion is broken down into issues relative to MSS Below 1 GHz followed by issues relative to MSS Between 1 and 3 GHz.[13]

9. This Second NOI includes discussion and consideration of some frequency bands that are allocated exclusively for federal government use and other bands that are shared co-equally between the private sector and the federal government agencies. Opposition to preliminary non-government MSS proposals for some of these bands has been expressed by NTIA and, through NTIA's Interdepartment Radio Advisory Committee (IRAC), by the government agencies. FCC WRC-95 proposals for these bands will be the subject of detailed discussions between the Commission and NTIA. U.S. proposals to WRC-95 and to future WRCs ultimately require agreement among the FCC, NTIA and the Department of State.

10. WRC-95 provides an opportunity to review technical constraints associated with MSS frequency bands below 3 GHz and to review any associated provisions, resolutions and recommendations. Parties to this proceeding, relevant ITU-R Task Groups and the IAC have identified such constraints whose removal or modification would improve the use of frequency bands allocated for MSS.

11. Constraints identified thus far fall into general categories: 1) technical constraints, such as those that specify the maximum power a satellite beam can produce at the Earth's surface[14] -- devised presumably to assist sharing spectrum with other services, or to determine if and where coordination with services of other

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[11] See id. at 2433-35. An exception to our general solicitation is the issue of RR 2613 that addresses the status of non-Geostationary (NGSO) MSS feeder link use of FSS spectrum (id. at 2434, para. 24).

[12] Task Group 8/3, Study Group 8 Preparation for Conference Preparatory Meeting 1995 (CPM-95), met from Nov. 17 to 25, 1994. Task Group 4/5, Feeder Links for the Mobile Satellite Service, met from Nov. 24 to 30, 1994. During the same period Task Group 2/2, that deals with interservice sharing issues, addressed some aspects of MSS sharing with other services.

[13] The exception is the discussion of feeder link issues. Feeder link issues here are germane only to MSS Between 1 and 3 GHz.

[14] Stated in terms of power flux density (PFD).

administrations is required; or, constraints that limit the radiated power emitted from MSS earth stations; 2) allocation constraints on existing MSS allocations, such as those that limit MSS networks to a lower allocation status, to certain categories of service or to certain geographic areas;[15] and 3) regulatory/procedural constraints, particularly those relating to non-geostationary orbit (NGSO) MSS coordination procedures. Our discussion on these issues is divided into two sections. Parties should bring to our attention any constraints not identified whose removal would ease use of frequencies for MSS (either below 1 GHz or between 1 and 3 GHz).

1. Constraints on MSS Below 1 GHz

12. Technical Constraints. Radio Regulation No. 608A (RR 608A) requires that the power flux density (PFD) of MSS mobile earth terminals (METs) operating in the 148-149.9 MHz band not exceed -150 dB ($W/m^2/4kHz$) outside of the licensing administration's borders. This restraint poses both operational and regulatory difficulties. The limit as written cannot be complied with strictly, yet it appears that this is an absolute limit on the acceptable PFD of the METs instead of a coordination trigger.

13. As in the case of footnote RR 608A, RR 608B imposes a PFD limit of -150 dB ($W/m^2/4kHz$) for METs in the 149.9-150.05 MHz band. This limit was devised to protect terrestrial fixed and mobile services from harmful interference from MET operations. This band, however, has no terrestrial allocations, and is shared with no terrestrial services.

14. Below 1 GHz MSS proponents suggest that the United States work to remove both the RR 608A and RR 608B PFD limits. STARSYS Global Positioning. Inc. (Starsys) states that because radiofrequency transmissions do not stop at international borders, the RR 608A and 608B requirements are impractical. Starsys contends that those requirements should either be removed or apply in instances where potential interference situations cannot be resolved between administrations.[16] The IAC proposes that the -150 dB ($W/m^2/4kHz$) PFD limit be eliminated, and replaced with an appropriate coordination triggering mechanism. Specifically, the IAC recommends that countries wishing to implement MSS systems be compelled to coordinate MET operations with administrations falling within a specified threshold distance of the implementing country's borders.[17] With regard to RR 608B, the IAC

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[15] These types of constraints are discussed briefly and also are summarized in the MSS spectrum allocation proposal tables in paragraphs 56 and 57.

[16] Starsys comments at 5.

[17] A method for calculating the threshold distance is described in ITU-R Document 8-3/TEMP/45-E (Geneva, 1994).

notes that this limit was devised to protect terrestrial fixed and mobile services from harmful interference from MET operations. This band, however, has no terrestrial allocations, and is shared with no terrestrial services. Accordingly, the IAC states that this footnote is unnecessary and recommends that it be eliminated.[18]

15. We agree that RR 608A and RR 608B would cause unnecessary difficulties in implementing NVNG systems. We believe in this case that PFD limits would be best negotiated between affected admistrations and would likely vary depending on the circumstance. We accept the IAC's recommendation and propose to eliminate RR 608A in favor of the coordination threshold distance methodology referenced above, and we propose to modify RR 608B as set forth in Proposal No. 2/L-LEO, Appendix 1.

16. Allocation Constraints. Within the band 137-138 MHz space research and meteorological satellite (MetSat) operations have primary status. MSS has co-primary status in the 137-137.025 MHz and 137.175-137.825 band segments, and secondary status elsewhere. In the U.S., the National Oceanic and Atmospheric Administration (NOAA) has indicated it has worldwide commitments to operate in these bands at least until the year 2006 and will have continuing operations until around the year 2010.[19]

17. The IAC recommends phasing out MetSat operations in the 137.175-137.825 MHz segments of the 137-138 MHz band where MSS now has co-primary status. It proposes a new footnote to the international table that will provide a co-primary status for MetSats until 2006 and a secondary status until 2010. This recommendation would provide for MetSat needs while later providing less encumbered spectrum for MSS. We note that the situation is similar for the 137-137.025 MHz portion of the band. We accept the IAC's recommendation, but also extend the IAC's proposal to the 137-137.025 MHz band, noting that the time frame for migrating MetSats has not been finalized. We invite comment on this proposal set forth in Proposal No. 2/L-LEO, Appendix 1. We also invite parties to comment on whether there is continued need for the space operation and space research alloctaions that also have co-primary status throughout the 137-138 MHz band.

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[18] IAC Interim Report at 62.

[19] In October 1994, Congress mandated that DoD and NOAA combine their polar orbiting meteorological satellite programs. This convergence, as well as the potential convergence with similar European meteorological satellite programs, is in the planning stage and the characteristics and frequencies of operation of new satellites are not defined. Consequently, the time frame for migrating meteorological satellites from the 137-137.025 MHz and 137.175-137.825 MHz band segments is still under discussion. Therefore, the years 2006 and 2010, referenced in the text above, appear in square brackets in the attached proposal for the 137-138 MHz band.

18. At WARC-92 the band 149.9-150.05 MHz was allocated to the land mobile-satellite service on a co-primary basis. The IAC has recommended that this allocation be redesignated to a generic mobile-satellite service. Below 1 GHz MSS proponents have noted that services they intend to provide would extend beyond strictly "land mobile" offerings and could include maritime and possibly aeronaurical offerings. Their view is that potential service offerings should not be limited needlessly.[20]

19. We continue to believe that generic MSS allocations afford operators maximum flexibility in introducing needed services. This is particularly important in the case of a service such as MSS that require a large initial capital outlay. Without the flexibility of generic allocations, providers may not find it economically feasible to launch systems devoted strictly to discrete applications. In addition, we note that this proposal aligns with the VGE's recommendations that service allocations be made as broadly as possible.[21] Therefore, we accept the IAC's recommendation and propose that the 149.9 - 150.05 MHz band be allocated to MSS generically as given in Proposal No. 2/L-LEO. Comment is invited.

2. Constraints on MSS Between 1 and 3 GHz

20. Technical Constraints. In the band 1610-1626.5 MHz, RR 731E stipulates that MSS mobile earth stations (MES) shall protect stations operating in accordance with RR 730 and RR 732. To protect stations operating pursuant to RR 732,[22] MESs are limited to an e.i.r.p. of -15 dB (W/4 kHz) in those parts of the band where such stations operate. In other parts of the band, MESs can operate up

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[20] Orbcomm comments at 10-11.

[21] In this regard we note that the IAC recommends that, in light of recent sharing techniques identified in TG 8/3, countries should reconsider the need for RR 608C. This footnote to the 148-149.9 MHZ bands states that MSS shall not cause harmful interference to, nor claim protection from stations of the fixed or mobile services in approximately 70 countries. Eliminating RR 608C would align with the VGE's attempt to eliminate country-specific footnotes to the Table of Frequency Allocations. We request comment on this recommendation. See IAC Interim Report at 62. Additionally, there is a consequential change to RR 599B. This change removes the 'land mobile-satellite' limitation.

[22] RR 732 reserves the 1610-1626.5 MHz band on a worldwide basis for the use and development of air navigation and directly associated terrestrial or satellite-based facilities. It also provides that any satellite use of the band is subject to agreement under the procedures of Article 14 of the international Radio Regulations. Pursuant to the international Radio Regulations, MSS stations may not cause harmful interference to or claim protection from stations operating in accordance with RR 732.

to an eirp of - 3 dB (W/4kHz). However, RR 731E does not specify whether these levels correspond to peak or mean values.

21. TG-8/3 noted that there is a need to clarify the e.i.r.p. density limits of RR 731E. Its view is that the limits should be in terms of the mean e.i.r.p. in a reference bandwidth of 4 kHz.[23] The IAC, in its Interim Report endorses that view.[24]

22. RR 731E also provides that mobile-satellite stations shall not cause harmful interference to, nor claim protection from stations in the aeronautical radionavigation service, stations operating in accordance with RR No. 732 and fixed stations operating in accordance with RR No. 730. MSS parties state that this provision effectively places co-primary MSS operations in a secondary status relative to stations operating pursuant to RR 732 and 730.[25] In its Interim Report, the IAC argues that RR No. 953 provides sufficient recognition of the need to protect radionavigation services operating in the band.[26] The MSS parties and the IAC recommend that this apparently contradictory text be deleted.

23. We intend to clarify footnote RR 731E by proposing that the e.i.r.p. density limit be expressed in terms of a "mean" rather than a "peak" value.[27] We also agree that RR No. 953 provides appropriate and sufficient recognition of the need to protect safety services operating in accordance with RR No. 732. With regard to fixed services operating in accordance with RR No. 730, we believe that sufficient protection can be afforded to these services in the coordination process. Consequently, we propose to delete the last sentence of RR 731E and replace it with text noting that the application of RR No. 953 applies in the 1610-1626.5 MHz band. See attached Proposal No. 3/B-LEO, Appendix 1.

24. RR 733E states that stations of the radiodetermination-satellite and mobile-satellite services shall not cause harmful interference to stations of the radio

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[23] See ITU-R Document 8-3/TEMP/58-E (Geneva, 24 November 1994).

[24] IAC Interim Report at 119.

[25] RR 730 provides an additional primary fixed service allocation in 16 countries. Pursuant to the international Radio Regulations, MSS stations may not cause harmful interference to or claim protection from stations operating in accordance with RR 730.

[26] Radio Regulation 953 of Article 9 cautions administrations that special heed be given to the safety aspects of radionavigation and other safety services when making assignments in bands in which those services operate.

[27] Parties are invited to provide or develop a method for calculating a mean value appropriate for this situation.

astronomy service (RAS) in the 1610.6-1613.8 MHz band.[28] MSS parties contend that RR 733E creates ambiguity in the status of 1.6 GHz MSS networks. Constellation argues that the RR 733E requirement that MSS not cause harmful interference to RAS is an apparent contradiction to MSS's primary status in the table of frequency allocations.[29]

25. The consensus of MSS participants in the IAC is that RR 733E should be suppressed. In its Interim Report, the IAC states that RR 733E was originally adopted at WARC-87 to protect RAS when RAS had a secondary status worldwide and RDSS was being introduced on a secondary basis. The IAC claims that since RAS has been made primary in the subject bands by WARC-92, special recognition bestowed upon RAS by WARC-87 is no longer needed. Further, it claims that RR 733E creates confusion and ambiguity with regard to the status of MSS and RDSS in the 1610.6-1626.5 MHz band. It also notes that in its Big LEO Report, the FCC has adopted sufficient protection for RAS in the 1610.6-1613.8 MHz band.[30]

26. RAS interests who participated in the IAC oppose suppression of RR 733E. The RAS community maintains that RR 733E is a flag that reminds other spectrum users of the need to use special coordination measures when operating in the 1610.6-1613.8 MHz band. They note that the special needs of RAS have been recognized by several WARCs, the VGE and the Commission in its Big LEO Report.[31]

27. We will not propose to suppress RR 733E at this time. We note that the rules for protecting RAS we adopted in the Big LEO Report were based on those agreed to by MSS and RAS interests who participated in the Commission's Above 1 GHz MSS Negotiated Rulemaking Committee.[32] One solution might be to suppress RR 733E and propose a new international footnote that incorporates the RAS

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[28] Radio Astronomy is allocated worldwide in the 1610-1613.8 MHz band. However, RR 733E applies the 1610-1626.5 MHz frequency range.

[29] Constellation comments at 5.

[30] See Big LEO Report, at paras. 100-113.

[31] IAC Interim Report at 105.

[32] Big LEO Report, supra.

protection rules embodied in the Big Leo Report.[33] We request comment on this suggestion, and also invite alternative proposals.

28. RR 753F subjects the radiodetermination-satellite and mobile-satellite services in the 2483.5-2500 MHz band to the coordination and notification procedures of Res. 46. With respect to terrestrial stations, coordination is required only if the space station PFDs at the Earth's surface exceed limits established in RR No. 2566.

29. NGSO MSS proponents contend that RR No.2566 PFD values should be regarded as a "trigger" value for coordination rather than absolute limits. Further, those proponents argue that the current PFD levels should be increased, as it is likely that their systems can operate at higher PFD levels without causing interference to terrestrial systems.[34]

30. The IAC notes that since RR 753F was adopted at WARC-92, substantial analyses have been undertaken that show the RR No. 2566 PFD limits are unduly restrictive. It contends that relaxing these limits would ease introducing NGSO MSS systems and would still provide sufficient protection for fixed terrestrial systems. Additionally, it contends that relaxing PFD limits would eliminate unnecessary coordinations that impact both MSS and fixed system providers.[35] The

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[33] In this regard, we disagree with the RAS community's inference that the Big LEO Report reaffirms retention of RR 733E. In that order, the Commission's concern was that RAS be protected in the 1610.6-1613.8 MHz band. To that end, it adopted a fixed-protection zone method. See 9 FCC Rcd at paras. 101-109; see also 47 C.F.R. § 25.213 (a). We note that modification of international regulations are agreed upon at conferences and, therefore, we did not modify RR 733E in the domestic proceeding.

[34] For example, with regard to specifying the RR 2566 limits as coordination triggers, Constellation states that above 1 GHz NGSO MSS operators intend to operate globally and that therefore it is desirable to set a coordination trigger at a level that would obviate the need for operational systems to coordinate with every country in the world. Constellation comments at 5. With regard to revision of PFD levels, Loral contends that its recent analysis shows that a typical CDMA NGSO MSS system operating at PFD levels higher than those specified in RR 2566 would not cause interference to terrestrial services. Loral proposes to replace the reference to RR 2566 in RR 753F with PFD values it provides in its comments. Loral comments at 13.

[35] The IAC claims that the current PFD levels specified in RR 2566 would result in required coordination with virtually every ITU member-nation. IAC Interim Report at 106.

IAC recommends that we propose to revise RR 753F by striking the reference to RR No. 2566 and providing increased PFD limits that are specific to RR 753F.[36]

31. Our concern is that MSS operators not be forced into unnecessary coordinations because of restrictive or unnecessary technical limits. We also believe that, in general, absolute PFD limits should be developed between administrations in the coordination process or be based on technical justifications relative to specific sharing or coordination cases. We concur with the IAC's recommendation and incorporate it in Proposal No. 3/B-LEO, Appendix 1. Comments are invited.

32. Allocation Constraints. The 1525-1559 MHz and 1626.5-1660.5 MHz bands are allocated to MSS, but have a structure that allocates various portions of the bands to mobile-satellite service, maritime-mobile satellite service, aeronautical mobile-satellite (R) service and the land mobile-satellite service. At past conferences the U.S. has consistently proposed generic allocations for MSS. However, our efforts have not met with total success.[37]

33. MSS proponents and the IAC recommend that the United States propose a generic MSS allocation throughout these bands with appropriate footnotes to provide safeguards and priority access for aeronautical and maritime safety services.[38] We continue to believe that generic MSS allocations offer the most cost and spectrum efficient use of spectrum allocated to satellite services. Consequently, consistent with our action for all proposed MSS allocations, we propose to make a generic MSS allocations in the referenced band and to include the appropriate safeguards for aeronautical and maritime safety services. See Proposal No. 3/B-LEO, Appendix 1.

34. The 1675-1710 MHz band is allocated to, among other services, the meteorological-satellite (MetSats) and meteorological aids (MetAids) services on a primary basis. In Region 2 there is a co-primary allocation for MSS. However,

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[36] The IAC contends that these increased limits would facilitate the introduction of NGSO MSS networks worldwide, while providing sufficient protection to analog point-to-multipoint fixed systems. See, e.g., ITU Radiocommunication Study Groups, Document 2-2/TEMP/89 (Rev. 1), (Geneva, 13 September 1994). On new digital fixed systems, of which few now exist, there could be significant impact. However, techniques to mitigate potential interference exist. Id. at 107. ITU-R Task Group 2/2 at its final meeting in December 1994, adopted a new recommendation to relax these PFD limits. Parties are invited to comment in this regard.

[37] In its Interim Report, the IAC provides a brief discussion of previous U.S. efforts to obtain generic MSS allocations in this frequency range. Id. at 26.

[38] See e.g., AMSC comments at 9-10; IAC Interim Report at 26-27.

footnote RR 735A provides that MSS shall not cause interference to, nor constrain the development of MetSats in this spectrum.

35. The IAC notes that Task Group 8/3 ITU-R Working Party 7C has completed a draft new recommendation regarding sharing between MetSats and MSS in the 1675-1710 MHz band.[39] It points out that sharing may be possible given certain conditions relating to sharing between earth stations and space stations in the two services, co-channel separation distances and how the band is used by meteorological satellite operators.[40] The IAC recommends proposing this band in WRC-95. We include this band as a preliminary draft FCC proposal for co-primary MSS in all three Regions. See Proposal No. 3/B-LEO, Appendix 1. We invite comment on this proposal, recognizing that the 1675-1700 MHz portion of the band is also allocated on a co-primary basis for meteorological aids for which additional sharing studies will be required.

3. Review of Regulatory/Procedural Constraints

36. The WRC-95 agenda includes a broad review of technical constraints associated with the frequency bands allocated below 3 GHz to MSS -- including associated provisions, resolutions, and recommendations. The Notice observed that this agenda item could include a wide range of subjects, including regulatory and procedural issues, and requested parties to identify and address constraints that might hinder advancement of worldwide MSS networks.[41] The IAC and commenting parties identify regulatory and procedural constraints, specifically those relating to Resolution 46 (WARC-92) (Res. 46) and RR No. 2613. In that regard, they propose remedies to address deficiencies in these procedures. These are enumerated below and are divided into issues identified by parties for Below 1 GHz MSS and for MSS Between 1 and 3 GHz.

37. Regulatory/Procedural Constraints - MSS Below 1 GHz. Resolution 46 (WARC-92) (Res. 46) provides an interim procedure for the coordination and notification of non-geostationary satellite networks with other services in spectrum

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[39] See Sharing of the 1675-1710 MHz Band Between the MetSat (Space-to-Earth) and the MSS (Earth-to-Space), ITU-R Doc. 7C/TEMP/4(Rev.2) and associated annexes contained in 7C/TEMP/5(Rev.2). If the draft new Recommendation is approved by the Radiocommunication assembly or prior to WRC-95, the MetSat service could be suppressed from footnote 735A. Sharing between MetAids and MSS is also being addressed in Working Party 7C. If the appropriate sharing criteria are developed and approved for this situation, MetAids could also be suppressed. However, that work remains to be completed.

[40] IAC Interim Report at 22.

[41] WRC Notice, 9 FCC Rcd at 2433.

they share. Res. 46 recognizes that specific criteria and calculation methods necessary for coordination of these systems are undergoing development. Although band specific footnotes dictate where Res. 46 applies and offer some guidance for determining when coordination is necessary, parties have indicated that specific improvements to Resolution 46 would ease coordinating MSS networks and therefore, could speed introducing MSS service.[42]

38. The IAC has identified several areas of Res. 46 for improvement that would affect Below 1 GHz MSS. Specifically, the IAC notes that Res. 46 requires coordinations to take place on the basis of identified frequency overlap of services. However, the IAC contends that even in such cases coordination may be unnecessary if certain space-to-Earth PFD levels are not exceeded. The IAC has indicated that the present requirements of Appendix 3[43] do not give information sufficient for calculating PFD levels precisely. It claims this could lead to an overestimation of the potential for interference into other systems and services. The IAC has recommended that the information requirements of Appendix 3 be expanded so that instantaneous PFD levels can be calculated as a function of the elevation angle from a point on the earth.[44] We believe that more accurately determining PFD levels could reduce the number of space and terrestrial systems of other administrations with whom an administration must coordinate its proposed NVNG MSS system. We invite parties to comment on this point and to provide specific proposals for expanding Appendix 3 requirements.

39. Section 2.8 of Res. 46 requires administrations that do not agree with the bringing into use of a frequency assignment shall, within a six month period of the notification of the requesting administration, send technical details and other information on its systems upon which its disagreement is based. The IAC has stated that in the experience of its members, this provision is not being followed.[45] It notes that without more detailed technical information on potentially affected systems, administrations cannot determine in a given situation whether coordination is actually necessary. The IAC recommends that to facilitate a more effective and efficient

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[42] For example, Orbcomm states that current Res. 46 procedures are workable and have the advantages of avoiding the need for country-by-country notification and establishing a date certain for potentially affected administrations to coordinate. However, it also remarks that clarifications of some aspects of Res. 46 would be helpful. Orbcomm comments at 7.

[43] Appendix 3 of the Radio Regulations contains information on notices relating to space radiocommunications and radio astronomy stations.

[44] IAC Interim Report at 69.

[45] Id.

process, it may be useful to provide an Appendix to Res. 46 that specifies detailed information that should be provided.

40. The Radiocommunication Bureau (BR) in its analysis of Res. 46 determined that it should take into account the modulation and type of multiple access employed by NGSO systems. In addition, in Res. 46, the BR has identified technical terms for which definitions should be provided.[46] We invite parties to identify additional information necessary to address these points.

41. Regulatory/Procedural Constraints - MSS Between 1 and 3 GHz. In its Interim Report, the IAC states that Resolution 46 may need further refinement based on experience gained since its adoption in 1992.[47] The IAC proposes changes to the Radio Regulations associated with specific 1-3 GHz MSS allocations and relating to the regulatory procedures of Resolution 46 and it suggests the following improvements to current Resolution 46 footnotes concerning technical and operational matters and coordination:[48] Some of the technically-oriented proposals listed below were addressed previously and are included below for completeness.[49]

- Modify footnotes to replace PFD thresholds of RR 2566 to reflect different pfd thresholds for specific frequency bands identified by Task Group 2/2;[50]

- Modify RR 731E to specify that the maximum e.i.r.p. density limits are based on the use of average (as opposed to peak) values;[51]

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[46] The technical terms for which definitions are requested are:

1. Active service arc;
2. Sub-satellite active area; and
3. Coordination region.

Parties are requested to develop definitions for these terms.

[47] IAC Interim Report at 89.

[48] Id. at 118. Loral states that the U.S. should ensure that Res. 46 and other procedures not impede implementation of NGSO MSS systems. Loral comments at 15.

[49] See infra at paras. 19-29.

[50] Id. at 118. See also Constellation comments at 4-6.

[51] IAC Interim Report at 119.

- Replace Section 2.5 of Resolution 46 (coordination with terrestrial services) with new methodology to be used to determine which Administration is to be coordinated with when the PFD limit for a specific 1-3 GHz MSS allocation is exceeded;[52]

- Modify Resolution 46 to provide a specific method to calculate coordination regions for purposes of paragraphs 2.1 and 2.2 which direct Administrations to effect coordination of satellite networks and stations of terrestrial networks "where assignments might be affected;"[53]

- Revise Note 1 of Resolution 46, Section III to replace current definition of coordination area with a new methodology contained in Recommendation ITU-R IS 847 (except in the case of aircraft stations);[54]

42. The IAC also identifies in general terms several areas where further improvement to Resolution 46 is in order, but it does not propose specific solutions:

- Current provisions fail to protect existing MSS systems from excessive interference caused by fixed service transmitters;

- Information provided in Appendix 3 is insufficient to perform necessary calculations relating to NGSO MSS satellite networks including: (a) orientation of satellite transmitting antenna beams necessary for PFD calculations, (b) specification of what data is to be included for purposes of coordination and agreements between Administrations set forth in Section 2.8; and (3) the type of multiple access and modulation and the maximum and average beam peak e.i.r.p./4 KHz and e.i.r.p./1 MHz for each beam should be submitted to better represent interference potential.[55]

43. Finally, the IAC Interim Report references Reservation 79 taken by the United States and the United Kingdom to the Final Acts of WARC-92. This reservation provides that the two Administrations will not apply Resolution 46 to

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[52] Id. at 119; see also ITU-R Doc. 8D/TEMP/1 (Rev. 1.), Geneva, 1994.

[53] Id at 119.

[54] In the case of aircraft stations, the coordination distance should be 500 km and the method of ITU-R IS 850 should be employed. The IAC notes that this approach has been approved by TG 2/2 and WP 8D. Id. at 119.

[55] Id. at 120.

geostationary satellite systems in certain frequency bands, *e.g.*, the 1525-1559/1626.5-1660.5 MHz bands, in order to ensure that systems already in coordination (such as AMSC and INMARSAT) are not subject to additional coordination procedures.[56] The IAC recommends that this position be clarified at WRC-95 by appropriate footnotes to the Table of Allocations.[57]

44. We will not make specific proposals that modify Res. 46 at this time. We note that as part of its effort to simplify the Radio Regulations the VGE has suggested changes that could substantially modify Res. 46.[58] We also note that the IAC is continuing its ongoing analysis of MSS regulatory/procedural issues and of the work of the VGE.[59] Recognizing the continuing work of the IAC and NTIA's RCS, parties are invited to comment on the issues we identify above and to provide further comment on potential modifications to Res. 46. In particular, we note that various

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[56] See Final Protocol No. 679, WARC-92 Final Acts, which provides:

> Referring to statements relating to the frequency range below 3 GHz concerning mobile-satellite services, it is necessary to highlight an oversight in drafting and reading texts which could lead to a new and unnecessary burden of coordination between geostationary space stations and terrestrial services in certain frequency bands. Accordingly, the above Administrations will not accept any commitment for this form of coordination arising from the omission of the term "non-geostationary" in the text of certain footnotes, *e.g.*, Footnote Nos. 726x and 7xx, to the Table of Frequency Allocations in Article 8. This reservation is made on behalf of all national and international organizations for whose frequency assignments the two countries are the notifying administrations.

See also AMSC comments at 16-17.

[57] IAC Interim Report at 121.

[58] See e.g., Report by the Voluntary Group of Experts to Study Allocation and Improved Use of the Radio Frequency Spectrum and Simplification of the Radio Regulations (VGE Final Report), at 88, 106 (1994).

[59] In that regard, IWG-1 of the IAC was tasked with coordinating the regulatory aspects of all issues under consideration by the other IAC IWGs (particularly, those relating to MSS). In its section of the Interim Report, IWG-1 indicates that input from the other groups has been sparse. We note that IWG-2 and IWG-3 of the IAC have addressed certain aspects of regulatory/procedural provisions, however, their work has not been reconciled. Indeed, that work continues. We encourage all parties to continue their analysis of regulatory/procedural issues and to assess the impact of specific proposed changes on the overall application of these regulatory/procedural issues.

MSS interests suggest specific revisions to Res. 46. We request that those parties note all proposed revisions to Res. 46 and that they develop a comprehensive Res. 46 revision "package." We also invite interested parties to examine closely the potential effect of the VGE work in this regard.

Mobile Satellite Feeder Links

45. MSS Feeder Link Regulatory Provisions. Current international provisions permit operation of NGSO MSS feeder links in the Fixed-Satellite Service (FSS) subject to certain regulatory provisions contained in Articles 8, 11, and 29 of the Radio Regulations -- including RR 2613.[60] These provisions, however, do not provide a commonly agreed interpretation for accommodation of NGSO MSS feeder link networks.[61] RR 2613 seeks to protect GSO FSS systems from unacceptable interference caused by space radiocommunication services using NGSO systems. This appears to place the burden of interference avoidance primarily on the NGSO MSS network, even where interference is the result of a later-established GSO FSS system. In addition, since unacceptable interference is fixed by agreement between administrations concerned, there needs to be provisions for correspondence and/or discussions between affected administrations to agree on what constitutes unacceptable interference. Thus RR 2613 has been interpreted as placing NGSO MSS feeder link networks at decided disadvantage.[62]

46. Accommodating NGSO MSS feeder links in FSS bands has been addressed by parties to this proceeding, the IAC and ITU-R Task Groups 8/3 and 4/5. These groups have identified specific spectrum use, technical and regulatory issues that point to actions needed to satisfy NGSO MSS feeder link spectrum requirements.

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[60] Radio Regulation 2613 (WARC-92) provides:

> Non-geostationary space stations shall cease or reduce to a negligible level their emissions, and their associated earth stations shall not transmit to them, whenever there is insufficient angular separation between non-geostationary satellites and geostationary satellites resulting in unacceptable interference[1] to geostationary-satellite space systems in the fixed-satellite service operating in accordance with these Regulations.
>
> The level of accepted interference shall be fixed by agreement between the administrations concerned, using the relevant CCIR Recommendation as a guide.

[61] IAC Interim Report at 159.

[62] Id.

Task Group 4/5 recently concluded: "[t]here is a general recognition that both the GSO FSS satellite networks and NGSO MSS feeder link networks must have a regulatory base which permits their orderly operation without any regulatory uncertainties to their full operational life."[63]

47. Task Group 4/5 noted that additional uncertainty results from the ITU Radiocommunication Bureau's non-application of RR 2613 in connection with its examination of systems under RR 1503.[64] TG-4/5 noted further that since NGSO MSS feeder links and NGSO/FSS systems are not subject to Res. 46 coordination procedures, there exists no procedure for providing protection to NGSO/FSS systems, including feeder links for NGSO MSS, from existing and future GSO/FSS systems.

48. The IAC encourages consideration of changes to Article 8, as recommended by Task Group 4/5, to qualify many FSS allocations to accommodate NGSO MSS feeder link networks on a more equal basis. Specifically, in bands below 17.7 GHz, due to the difficulty of co-directional sharing of frequencies between NGSO MSS feeder links and GSO FSS networks, the IAC proposes that regulatory changes be made to give NGSO MSS feeder links priority status over GSO FSS networks in specific reverse transmission directions[65] in certain bands allocated to FSS networks.[66] In any FSS allocations where this priority approach could not be applied, particularly in bands now heavily used by GSO FSS systems, RR 2613 would be maintained, but modified to clarify its specific application.[67] In addition. Res. 46 (possibly modified by WRC-95) would apply to coordination between GSO FSS and NGSO FSS networks, between multiple NGSO FSS networks and between NGSO FSS networks and terrestrial services.[68] These revisions would be

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[63] ITU-R Doc. 4-5/TEMP/32(Rev.1)-E, Geneva, 1994; accord IAC Interim Report at 159.

[64] Specifically, the BR does not apply RR 2613 in its examination of Appendix 3 notifications.

[65] Reverse transmission NGSO MSS feeder links are those that operate in a direction opposite that indicated in the allocation table for FSS bands.

[66] Id. at 161. However, this priority would not extend to NGSO feeder links that operate co-directionally in FSS bands.

[67] Id. at 161.

[68] We question whether the current Appendix 28 coordination procedures might be more appropriate for coordinating NGSO FSS Earth stations with terrestrial services instead of a modified Res. 46 procedure. We invite comment in this regard.

accomplished by adding suitable footnotes to the Table of Frequency Allocations in the relevant bands.[69]

49. In bands above 17.7 GHz, where in many instances it appears that co-directional sharing between GSO FSS and NGSO MSS feeder link networks is feasible (with appropriate constraints), TG -4/5 identified a potential method for accommodating NGSO MSS feeder links in specific frequency sub-bands.[70] This method would apply to bands used relatively lightly by GSO FSS systems. It would provide a footnote attendant to such bands that would place competing NGSO FSS networks on an equal regulatory status with GSO FSS networks. NGSO networks would be exempt from RR 2613 and would be coordinated using Res. 46 or Article 11, modified suitably. Successfully coordinated systems would have full protection rights from other users. As in the below 17.7 GHz case, these revisions would be accomplished by adding suitable footnotes to the relevant bands.[71]

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[69] In FSS bands where NGSO MSS feeder link networks are given priority status, the following footnotes would apply:

792BX The use of the band [xxxx] by the fixed-satellite service (direction) is limited to non-geostationary mobile-satellite service feeder links (feeder link direction). The provisions of RR 2613 do not apply for this fixed-satellite service (direction) allocation.

Note: the feeder link direction specified would vary according to whether co-directional or reverse direction feeder links are specified for a particular band.

To direct coordination, the following footnote would be added:

792BY The use of the band [xxxx] by the fixed-satellite service is subject to the application of the coordination and notification procedures set forth in Resolution 46 (as modified), for the coordination between geostationary networks (direction) and non-geostationary networks (direction), between non-geostationary networks (direction) and between non-geostationary (direction) and terrestrial services.

Directions for feeder link transmissions and for fixed-satellite service transmissions would be band specific and would be determined accordingly.

[70] See ITU-R Document 4-5/Temp/32 (Rev.1)-E at 3. The IAC endorses these options in its Interim Report.

[71] Id.

50. The IAC also noted possible revisions to Article 8 and Resolution 46 identified by TG-4/5 that would make all coordination procedures applied to GSO FSS networks also applicable to NGSO MSS feeder link networks in those bands identified for co-primary use. Specifically, Article 8 would be revised to state clearly frequency bands and directions of transmission, whether bands are limited to NGSO MSS feeder links or are shared on a co-equal basis with GSO FSS networks and whether Resolution 46 would apply. Additionally, text would be added to the Annex to Resolution 46 to cover the cases of coordination between NGSO MSS feeder link stations and GSO earth stations operating in opposite transmission directions.

51. Finally, the IAC indicates that a key factor in accommodating NGSO MSS feeder links in FSS bands is how the BR takes the current RR 2613 (Art. 29) into account when evaluating GSO FSS and NGSO MSS feeder link networks. It notes that in addition to the possible revisions discussed above, it may be necessary to modify RR 2613 and other relevant provisions to make NGSO MSS feeder link access to FSS bands easier. The IAC notes that for any allocations where NGSO MSS feeder links would operate in the space-to-Earth direction, there is a need to include appropriate satellite PFD limits to protect terrestrial networks and GSO FSS space stations operating in the opposite direction of transmission. The IAC suggests that WRC-95 decide what modifications may be required.

52. Obtaining sufficient NGSO feeder link spectrum for 1.6/2.4 GHz 'Big LEO' MSS networks is critical for the introduction of those networks in the U.S. and globally.[72] Introducing additional such systems in, for instance, an expanded 2 GHz MSS allocation, will require even more NGSO feeder link spectrum. Consequently, spectrum must be made available for NGSO feeder link use either exclusively or on regulatory/procedural parity with GSO FSS networks. Therefore, in conjunction with

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[72] U.S. Big LEO applicants have requested the following spectrum for feeder link use:

Motorola:	19.4 - 19.6 GHz (space-to-Earth) 29.1 - 29.3 GHz (Earth-to-Space)
Constellation	5050 - 5250 MHz (Earth-to-Space) 6825 - 7025 MHz (space-to-Earth)
Ellipsat:	15.4 - 15.7 GHz (Earth-to-Space) 6725 - 7025 MHz (space-to-Earth)
TRW:	29.7 - 30.0 GHz (Earth-to-Space) 19.8 - 20.1 GHz (space-to-Earth)
Loral/Qualcomm:	5.025 - 5.250 GHz (Earth-to-space) 6.875 - 7.025 GHz (space-to-Earth)

the IAC we are developing specific regulatory/procedural revisions that align with the preliminary findings of the IAC and of TG-4/5 discussed above. These proposals would include footnotes to frequency bands identified for use exclusively by NGSO feeder link networks,[73] and any associated revisionary text to Articles 11 and the Annex to Resolution 46. We invite parties to comment on the above topics and to provide specific alternative proposals to modify RR 2613 to accommodate NGSO MSS feeder links and to eliminate the current ambiguity in its general application for NGSO FSS and GSO FSS networks.[74]

53. MSS Feeder Link Spectrum Requirements. In order to implement the NGSO MSS systems currently proposed in the United States and elsewhere, it is critical that sufficient suitable spectrum be identified and made available for use for NGSO MSS feeder links. The IAC estimated the spectrum requirements for several frequency bands in the 4-31 GHz range given in the table below. These estimates agree with conclusions reached by Task Group 8/3.[75] Final spectrum requirements will be based on each NGSO MSS system's specific design and its operator's service objectives. The table assumes that the satellite systems' antennas will be able to use dual polarization for the frequency bands below 16 GHz which serves to reduce the amount of spectrum required.[76]

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[73] In the following section on feeder link spectrum requirements, the bands to which these proposed footnotes apply are identified in Table 5.

[74] Parties should note that Teledesic Corporation (Teledesic) has requested that RR 2613 be modified so that NGSO systems providing FSS receive equal priority in FSS bands. Teledesic contends that coordinations that are neutral to system type should be adopted. Teledesic comments at 4-5. Teledesic is proposing a constellation of NGSO satellites to provide service to fixed locations. RR 2613 does not address clearly how NGSO FSS should be considered.

[75] See ITU-R Document 8-3/TEMP/53 (Rev.1)-E, Geneva, Nov. 24, 1994.

[76] IAC Interim Report at 146-147.

Table 1.

Current Estimates for Feeder Link Spectrum Requirements for First Generation[77] NGSO MSS Systems in the 1-3 GHz Band

Frequency Range	Spectrum (each direction) Sharing Possible*	Spectrum (each direction) No Sharing
4-8 GHz	200 MHz*	400 MHz*
8-16 GHz	200 MHz*	400 MHz*
16-30 GHz	200 MHz**	500 MHz **

*Use of dual polarization assumed
**Dual polarization not feasible[78]

The commenters generally express support with the above estimates.[79] Further comment on this matter is welcome.

54. MSS Feeder Link Spectrum Allocations. The following frequency bands have been identified by the IAC and the Commission staff as potentially suitable for sharing by NGSO MSS feeder links in the direction(s) indicated. Some bands are identified as candidates for U.S. proposals.[80] See Proposal No. 1/FL-MSS. Other

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[77] These estimates would likely just satisfy requirements for current 1.6/2.4 GHz NGSO MSS systems. New NGSO MSS systems, or any additional such systems in future 2 GHz MSS allocations would likely necessitate setting aside more spectrum.

[78] IAC Interim Report at 146-147; The spectrum requirement estimates identified in Table 4 do not include requirements for future generation NGSO MSS systems due, in part, to the difficulty to project accurately such requirements for future designs. Id. at 147-148.

[79] See, e.g., Constellation Comments at 10; Motorola Comments at 16; but see COMSAT Mobile Comments at 14-15.

[80] Parties should note that, due to time constraints, IWG-4 of the IAC did not propose specific bands in its contribution to the Interim Report. However, it did endorse candidate bands identified by Task Group-4/5. See IAC Interim Report at 166. Our table includes those bands as well as bands identified as candidates by the Commission staff.

bands might remain under consideration at this time.[81] Certain bands are identified as being candidates for pairings with other bands in the table. We request comment on these pairings. In cases where one part of a proposed pairing has more spectrum than the other, but has relatively high existing service use, we invite comment and proposals on alternatives (e.g. band segmentation in the larger band; specific frequency pairings;[82] etc.) for linking the two bands. Additional comments are requested on all of the candidate bands, including their sharing possibilities.[83] Interested parties should also note bands to which the regulatory provisions discussed in the preceding section could apply.

55. Some bands are identified for feeder link transmissions using reverse band working (RBW).[84] Generally, these are bands below 17.7 GHz.[85] Task Group 4/5 studied the possibility of reverse band operation of NGSO MSS feeder links in FSS bands. It concluded that RBW appeared promising in the C and Ku bands.[86] For the C and Ku cases, Task Group- 4/5 developed NGSO PFD limits (applied at the geostationary orbit) designed to protect GSO networks and eliminate the need to coordinate RBW feeder links. The limit is:

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[81] Note: if bands that correspond to the FSS Allotment Plan (cite) are considered for new allocations, modification to and/or protection of the plan must be considered. Additional proposals may be required.

[82] For example, we are proposing to pair the 250 MHz of spectrum in the 5-5.25 GHz band for uplink transmissions with spectrum in the 6.525-7.075 GHz band for downlink transmissions. Initially, we are proposing to pair the 6.825-6.775 GHz portion of that band. We invite comment on whether an alternative downlink pairing would be preferable.

[83] When developing comments, parties should take note of the IAC's discussion of NGSO MSS feeder link sharing with other services and with other feeder link networks. See IAC Interim Report at 150-157. Parties should also note that in some bands there are domestic allocations that could limit feeder link use. For example, in the 6.425-7.125 GHz range there is significant use by the broadcast auxiliary service; in the 10 GHz and 18/19 GHz bands there is use by the digital electronic messaging service.

[84] In proposed "RBW" bands, NGSO MSS feeder links would transmit in a direction opposite that specified for FSS in the Table of Frequency Allocations.

[85] RBW operation in Ka band could be difficult if large numbers of VSATs and mobile earth terminals that do not require licensing or coordination are implemented -- particularly if they are in the 29.5-30 GHz band.

[86] Co-directional sharing in these bands is possible. However, in bands with large numbers of GSO FSS systems, significant operational constraints on NGSO MSS feeder links would be required to reduce the percentage of time where interference between systems occurs. See, e.g., IAC Interim Report at 150-151.

- 4 - 8 GHz (C band) -168 dB(W/m^2/4 kHz)
- 10 - 16 GHz (Ku band) - 168 dB(W/m^2/4kHz)

If we finalize proposals for RBW bands we would also propose to adopt these limits and consequently to make the appropriate modifications to Section V. of Article 28 (RR). These limits would apply only to those bands identified for RBW use. We request comment on these limits. Parties who disagree with these PFD limits for NGSO MSS feeder links should provide a technical basis for alternative limits.

Table 2.

Candidate Bands for NGSO MSS Feeder Link Spectrum[1]

Frequency Band (GHz)	[illegible]	Current Primary Allocations	Sharing Potential	
			Co-Directional	Bi-Directional
4.5-4.8[2]	300 ↑	FSS, FS, MS[3]	Sharing not feasible	Sharing feasible
5-5.25[4,5]	250 ↑	ARNS[6], FSS	Sharing feasible	Sharing feasible
5.85-5.925	75 ↓	FSS, FS, MS		
6.425-6.525	100 ↓	FSS, FS, MS		
6.525-6.775	250 ↓	FSS, FS, MS, BA	Sharing not feasible	Sharing feasible
6.525-7.075	550 ↓	FSS, FS, MS, BA	Sharing not feasible	Sharing feasible
10.7-10.95[7]	250 ↑	FSS, MS, FS	Sharing not feasible	Sharing feasible
11.2-11.45[7]	250 ↑	FSS, MS, FS	Sharing not feasible	Sharing feasible
12.75-13.25	500 ↓	FSS, MS, FS	Sharing not feasible	Sharing feasible
15.4-15.7[8]	300 ↑	FSS, ARNS[9]	Sharing feasible	Sharing feasible
17.7-17.8[10]	100 ↓	FSS, FS, BSS	Needs study	Needs study
17.8-18.1	300 ↓	FSS, FS, MS	Needs study	Needs study
18.1-18.4	300 ↓	FSS, FS, MS	Needs study	Needs study
18.4-18.9	500 ↑↓	FSS, EES, FS, MS, SR[11]	Sharing feasible	Sharing possible, if paired with a lower band
18.9-19.2	300 ↓			

Frequency Band (GHz)	Bandwidth (MHZ) & Direction	Current Primary Allocations	Sharing Potential	
			Co-Directional	Bi-Directional
19.2-19.7[12]	500 ↓	FSS, FS, MS	Sharing feasible	Sharing possible, if paired with a lower band
19.7-20.1	400 ↓	FSS,MSS(R2)		
24.75-25.25	500 ↑↓	FSS (R2&3)		
27.5-28.5	1000 ↑	FSS, FS, MS	Sharing feasible	Operationally impracticable
28.5-29.0	500 ↑	FSS, FS, MS	Sharing feasible	Operationally impracticable
29.0-29.5	500 ↑			
29.5-29.9	400 ↑	FSS, MSS		
29.9-30	100 ↑	FSS, MSS		

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Notes to Table 2.

* Indicates candidate band is attached as a preliminary proposal. New footnotes proposed in the preceding feeder link regulatory section would apply.

↑ = uplink (Earth-to-space) direction
↓ = downlink (space-to-Earth) direction

ARNS: Aeronautical Radionavigation Service
BA: Broadcast Auxiliary Service
FS: Fixed Service
FSS: Fixed-Satellite Service
MS: Mobile Service
MSS: Mobile-Satellite Service
SR: Space Research

Notes to Table 2., continued

Note 1 - Task Group 4/5 analyzed sharing constraints extensively. See ITU-R Document 4-5/TEMP/SUM, Geneva 1994.
Note 2 - Task Group 4/5 noted that sharing was feasible if the frequency band was not being used by fixed troposcatter systems. However, the 4660-4685 MHz band portion of the 4.5-4.8 GHz band is under consideration in ET Docket No. 94-32, where it has been identified for potential fixed and mobile service use. See Notice of Proposed Rulemaking, (Spectrum Transfer Notice) ET Docket No. 94-32, 9 FCC Rcd 6779 (1994). Therefore, it is unlikely that we would propose the 4.5-4.8 GHz band for feeder link use.
Note 3 - See ITU-R Document 8-3/TEMP/54-E, Geneva, 1994, for an analysis of frequency sharing with mobile services in this band.
Note 4 - The 5-5.25 GHz band is proposed to be paired with the 6.825-7.075 GHz band.
Note 5 - The 5-5.25 GHz band is allocated to the aeronautical radionavigation service and in accordance with RR 796, the Microwave Landing System (MLS) has precedence over all other uses of the band. Currently, MLS occupies the 5030-5091 MHz portion of the band and is planned to extend its use up to 5150 MHz. Task Groups 8/3 and 4/5 have analyzed the sharing situation between MLS and NGSO MSS feeder links and have indicated that sharing may be feasible given certain constraints. However, Task Group 4/5 recommends that, given the safety aspects of MLS, the two services use non-overlapping spectrum. Additionally, Task Group 4/5 notes that MLS could be 'reorganized' in the future into the 5000-5120 MHz portion of the band. This would yield 130 MHz of non-overlapping, contiguous spectrum that could be used for NGSO MSS feeder links. See ITU-R Document 4-5/Temp/38 (Rev.1) at 2.1.3.8.1.1. U.S. delegation members, including those from the FCC, NTIA, the Department of State, and the FAA did not oppose these conclusions.
Note 6 - See ITU-R Document 8-3/TEMP/55-E, Geneva, 1994, for an analysis of frequency sharing in this band.
Note 7 - The 10.7-10.95 and 11.2-11.45 GHz bands are proposed to be paired with the 12.75-13.25 GHz band.
Note 8 - Proposed to be paired with spectrum in the 18.9-19.2 GHz band.
Note 9 - See ITU-R Document 8-3/TEMP/54-E, Geneva, 1994, for an analysis of frequency sharing in this band.
Note 10 - Footnotes RR 869 and 870A limit the use of the band by the fixed-satellite service to feeder links for the broadcasting-satellite service. If NGSO MSS feeder links are permitted in these bands those footnotes would need to be suppressed or modified.
Note 11 - The 18.6 - 18.8 GHz band is allocated to the Earth exploration-satellite service in Region 2.
Note 12 - We proposed to pair the 19.2-19.7 GHz band with 500 MHz of spectrum within the 27.5 - 29.5 GHz band. The most logical pairing would be with the 29.0-29.5 MHz band. However, the Commission is engaged in other rulemaking proceedings

that could affect the availibility of the 29.0-29.5 MHz band for feeder links. Therefore, we request comment on both the 29.0-29.5 GHz and alternate 500 MHz segments within the 27.5-29.5 GHz range for pairing with the 19.2-19.7 GHz band. We include the 29.0-29.5 MHz band as an example '500 MHz' proposal.

Further details on the constraints associated with these bands are identified in the IAC Interim Report.[87] Additionally, parties should take account of the proposed regulatory provisions described previously that apply to candidate bands as indicated in footnotes to Table 5.

5. MSS Spectrum Requirements/Allocations

56. Spectrum Requirements/Proposed Allocations - MSS Below 1 GHz. Non-voice, non-geostationary MSS proponents who intend to operate below 1 GHz have indicated a need for at least an additional 10 MHz of spectrum, available for network use by the year 2000, and for an additional 13-20 MHz by the year 2010. The IAC identified candidate bands that may be suitable for these operations and recommends seeking an allocation of 10 MHz of spectrum at WRC-95. The bands it identified are listed in the table in Appendix 2.

57. While the proposed bands total more than 10 MHz, the identification of a number of candidate bands will likely be necessary to ensure the worldwide allocation of 10 MHz at WRC-95. Note that the IAC has prioritized candidate bands into three categories. They are:

Priority One	bands the IAC considers as most desirable for allocation in the near term and on a worldwide basis;
Priority Two	bands where NVNG MSS can share with existing services, however, achieving worldwide allocations might be difficult; and
Lowest Priority	bands used heavily in the U.S. However, the nature of existing operations might permit sharing.

The priorities above are the IAC's assessment of the potential for using the bands it identifies. We note that all of the 'Priority One' bands for which the IAC has submitted draft conference proposals are either allocated exclusively for government use or for shared government - non-government use. NVNG MSS use of these bands has not been coordinated or agreed upon among the FCC, NTIA or government agency users. Therefore, it is premature to indicate that these bands will be U.S. proposals to WRC-95. We invite parties to comment on potential NVNG MSS allocations in the bands in the table, particularly the 'Priority One' bands,[88]

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[87] IAC Interim Report at 167-69.

[88] The IAC's 'Priority One' bands are: 138-141 MHz (space-to-Earth) and 141-144 MHz (Earth-to-space); 225-235 MHz (space-to-Earth) and 390.0-399.9 MHz (Earth-to-space); 312-315 (Earth-to-space) and 387-390 MHz (space-to-Earth); and 399.9-400.05 MHz (both

noting that, with the exception of the 399.9-400.05 MHz band, such use has not been coordinated or agreed upon between the FCC and NTIA. We also invite parties to identify and give consideration to potential below 1 GHz NVNG MSS allocations in non-Government spectrum.[89] Additionally, recognizing that it may be difficult to agree on U.S. proposals for allocations in spectrum with primary Government allocations, parties should attempt to identify potential allocations that might use both Government and non-Government spectrum.[90]

58. Two of the IAC's candidate bands are being included as preliminary FCC proposals for WRC-95. One, the 399.9-400.05 MHz band has an operation that will cease by 1 January 1997. The IRAC's RCS also includes this band as a preliminary WRC-95 proposals for NVNG MSS. The other, the 137-138 MHz band is used in the U.S. by NOAA and DoD for MetSats operations. However, Congress has mandated that those entities consolidate their MetSat programs. This convergence of programs is still under discussion. Consequently, the time frame during which MetSats might migrate from this band is as yet uncertain. Discussions with NTIA on the eventual availability of this band continue. We invite further comment on including this band as a FCC proposal for a NVNG MSS allocation at WRC-95.

59. Spectrum Requirements/Allocations - MSS Between 1 and 3 GHz. There are numerous existing or proposed MSS networks worldwide. These networks will compete for approximately 200 MHz of MSS spectrum currently available on a worldwide, co-primary basis. In the IAC, a methodology for converting traffic projections for MSS to needed spectrum was developed.[91] Using that methodology,

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directions). With regard to the 380-399.9 MHz spectrum range, we note that in Europe and the United States, some entities have indicated a desire to reserve any non-military use for land mobile public safety services (see para. 104, infra.). We invite comment on the ability of NVNG MSS to share with existing and future fixed and mobile services in this spectrum.

[89] For example, we note that the IAC includes the 470-512 MHz and 512-806 MHz bands under its 'Priority Two' categorization as possible candidates for NVNG MSS allocations in the long term. In the United States, these bands are allocated for television broadcasting. For these bands, we invite parties to comment on the technically feasibility of spectrum sharing between NVNG MSS and both existing analog and future digital television broadcasting.

[90] For example, it is usually necessary to have a certain percentage of frequency separation for send and receive transmissions. Given that a NVNG MSS allocation around 400 MHz is desirable and a frequency separation on the order of 5-7% is needed, would it be possible to obtain allocation in the 380-400 MHz range for one transmission direction with a companion allocation in the 420-450 MHz range? Parties should identify such possibilities.

[91] See IAC Interim Report at 90-101.

the IAC arrived at the following spectrum requirements, given in Table 4, for handheld terminal, NGSO MSS.

Table 4.

MSS Spectrum Requirements by the Year 2005.
(Handheld Terminal, NGSO MSS)

Market Estimate[92]	Subscribers (Millions)	Equivalent Spectrum Requirement (each direction)
LOW	4.11	19.3 MHz
LOW	6.0	28.1 MHz
MEDIUM	15.0	70.2 MHz
HIGH	22.0	103 MHz

60. The estimates in Table 4 are for NGSO networks only. Prior to WARC-92, the Joint International Working Party for WARC-92 projected that between 88.8 MHz and 164.1 MHz of spectrum in each direction would be needed for GSO MSS by 2010. Recently, ITU-R Task Group 8/3, based on inputs from Inmarsat and others, has produced forecasts for MSS spectrum requirements to the year 2005.[93] The Inmarsat material input to Task Group 8/3 forecasts a minimum of 61.3 MHz in each direction and a realistic requirement of 105.7 MHz in each direction needed by the year 2005. Compared to other estimates, the Inmarsat-based forecasts are revised downward. This is because Inmarsat factored in a potential overlap in providing land mobile-satellite services (LMSS) between GSO and NGSO MSS networks. Nevertheless, a considerable amount of spectrum for GSO MSS will be required. The IAC estimates that when all forecasts are taken into account, a total of 150-300 MHz of MSS spectrum will be required by the year 2005.[94]

61. The table below lists candidate bands for future MSS spectrum allocations. This table includes both potential "new" MSS allocations and bands listed

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[92] These estimates are based on various MSS market studies. See IAC Interim Report at 91.

[93] See ITU-R Document 8-3/TEMP/39(Rev. 1).

[94] IAC Interim Report at 96.

earlier in the Allocation Constraints section. Bands that we intend to propose for allocation at WRC-95 at this juncture are noted and appear in Proposal No. 1/B-LEO Appendix 1.[95] The 1675-1710 MHz band is listed in the table, however, discussion is continuing between the FCC, NTIA and the National Oceanographic and Atmospheric Administration on conditions for access to this band continue.[96] We request comment on these and any other bands between 1 and 3 GHz that may be suitable for MSS .[97]

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[95] The IAC also identified the 2300-2310 MHz, 2390-2400 MHz and 2402-2417 MHz bands as potential locations for MSS allocations. See IAC Interim Report at 117. However, these bands are part of the transfer of spectrum from Federal use to private sector use and are under consideration in our Spectrum Transfer Notice as candidate bands for mobile and fixed services. They are not likely candidates for U.S. proposals for MSS allocations. In particular, the 2300-2310 MHz band is being given to non-government use on an accelerated basis, but only for non-space, non-airborne services. With regard to the 2390-2400 MHz band, in its preliminary report on identification of spectrum for private sector use the Department of Commerce expressed concern over the possible effect of private sector use on the National Astronomy and Ionospheric Center that conducts planetary research at 2380 MHz. To protect those operations the Department of Commerce stipulates that this band should not be used for airborne or space-to-Earth links. See Spectrum Transfer Notice at paras. 5-6.

[96] NTIA has indicated that ITU-R Working Party 7C will address draft new Recommendations that address the feasibility of sharing between MetSats and MSS. If these recommendations are approved prior to WRC-95, NTIA suggests that the meteorological satellite service could be suppressed from footnote RR 735A (see para. 35, supra.). However, until studies that address sharing between MSS and the meteorological aids service are completed, that service should be retained in RR 735A.

[97] Additional analysis and information on these bands can be found in the IAC Interim Report at 101-118.

Table 5.

Candidate Bands for Worldwide MSS Spectrum Allocations

Band (MHz)	Bandwidth & Direction	Notes	Use Summary	Draft FCC Proposal?
1675-1710	35 MHz ↑	Make primary worldwide.	MetAids, Metsat, fixed and mobile[98]	Yes
1525-1559/ 1626.5-1660.5	34 MHz ↓	Make Generic, Primary MSS in all 3 Regions	Sharing with fixed in certain countries under RR 730; some sub-bands subject to sharing.	Yes
	34 MHz ↑			
1985-2025/ 2165-2200	35 MHz ↑	Potential Domestic Allocation Adjustment[99]	Fixed Mobile	Yes
	35 MHz ↓			

Key to Table:

↑ = proposed Earth-to-space transmission direction
↓ = proposed space-to-Earth transmission direction

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[98] Note para. 36, infra. that discusses current use of this band. Parties should also identify potential sharing possibilities for this proposed uplink band. For example, there will likely be high demand worldwide for 2 GHz MSS spectrum. It may be possible to pair this band with downlink spectrum in the 2 GHz range. Comment is invited.

[99] After restructuring its 2 GHz PCS allocations to expand into part of the Region 2 GHz MSS allocations made at WARC-92, the Commission indicated that it would seek additional MSS spectrum in the 2 GHz range. Concurrent with the adoption of this Notice, the Commission is adopting a Notice of Proposed Rulemaking that address 2 GHz MSS issues.

62. Parties should note that the attached 1-3 GHz MSS proposals (No. 1/B-LEO) incorporate proposed adjustments to current 2 GHz MSS allocations made at WARC-92. These adjustments reflect the Commission's allocation of the 1850-1990 MHz band for Personal Communication Services (PCS),[100] and its effect on our ability to use that spectrum for MSS in the United States. Specifically, WARC-92 made a secondary allocation for MSS in the 1930-1970 MHz band for Region 2 only. We are proposing to eliminate this allocation in the 1930-1945 MHz portion of this band. WARC-92 also made a primary allocation for MSS in the 1970-1980 MHz band for Region 2 only. We are proposing to drop the status of MSS in this band to secondary. This would reflect the current PCS use in the U.S. but could allow some MSS operation. Finally, we propose to eliminate the primary MSS allocation in the 1980-1985 MHz band in all three Regions. This last proposal leaves a 5 MHz primary MSS overlap with the our domestic PCS allocation. Although this spectrum may not be useable for primary MSS in the U.S.,[101] it may be useable in other parts of Region 2 and it provides additional spectrum for coordinating spectrum use between administrations international MSS networks. We invite comment on this proposed MSS allocation structure.

6. Date of Entry Into Force of MSS Spectrum Allocations Around 2 GHz.

63. At WARC-92, different dates of entry into force (dates of entry) of 2 GHz MSS allocations were agreed upon. Footnote RR 746C specifies a date of entry of 1 January 1996 onwards for the United States, whereas RR 746B specifies a date of entry of 1 January 2005. In Task Group 8 /3, it was noted that, with new interest in implementing 2 GHz MSS systems on the part of administrations other than the United States, this difference in dates of entry could have an adverse impact on implementing non-U.S. MSS networks.[102]

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[100] See id. This decision likely precludes use of the 1970-1990 MHz band for co-primary MSS.

[101] Our proposals in this proceeding reflect our desire to obtain common, useable worldwide MSS allocations at 2 GHz. We note however, that at least one U.S. petitioner (CELSAT, Inc.; RM-7927) has indicated that it desires to implement a hybrid PCS/MSS network that would use PCS spectrum on a co-primary basis. As there are differing, evolving requirements for access to 2 GHz spectrum for both terrestrial and MSS networks, parties should take these into account.

[102] See ITU-R Document 8-3/TEMP/36 (Rev.3), Geneva, 1994. This relates to the fact that MSS systems can only be notified 6 years in advance of the date of entry of an allocation. Many administrations have advance published 2 GHz MSS systems in advance of that timeframe and thus have been given unfavorable findings by the BR.

64. Parties take positions on both sides of the date of entry issue. Motorola opposes advancing the date of entry. Motorola argues that the U.S. should not support advancing the date of entry, because that action would be inconsistent with the use of 2 GHz spectrum for Future Public Land Mobile Telecommunication Systems (FPLMTS)-compatible satellite systems.[103] Motorola states that it would support moving the U.S. date in RR 746C to 1 January 2005 so that all potential MSS operators would face identical constraints.[104]

65. COMSAT Mobile Communications (COMSAT) argues that the U.S. should propose moving the RR 746B date of entry forward to be compatible with the U.S. date (1996-2000). COMSAT contends that there will likely be early saturation of MSS bands, therefore, it is urgent that WRC-95 provide access to 2 GHz bands around the year 2000.[105] COMSAT also maintains that early access to 2 GHz spectrum would facilitate provision of a FLMPTS-compatible satellite component worldwide.

66. The Commission's IAC recommends that the United States propose no change to its RR 746C date. It takes no position on advancing the RR 746B date. However, it does recommend that the U.S. adopt a position supporting a transition plan to gradually introduce MSS into 2 GHz bands sometime prior to the year 2005.

67. We note that although the current 1996 U.S. date of entry of RR 746C affords the United States maximum flexibility in implementing U.S.-based MSS networks, advancing the 2005 date of RR 746B could facilitate early introduction of global MSS networks -- including future networks in which U.S. entities may have interests. Therefore, we believe that consideration of the differing dates of entry into force of 2 GHz MSS allocations should be in the context of an overall approach to making available 2 GHz MSS spectrum, including potential expansion of existing allocations as proposed elsewhere in this document. Therefore, we will not make a specific proposal at this time.

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[103] RR 748A (WARC-92) states in part: "The frequency bands 1885-2025 MHz and 2110-2200 MHz are intended for use, on a worldwide basis, by administrations wishing to implement the future public land mobile telecommunications systems (FPLMTS). Such use does not preclude the use of these bands by other services to which the bands are allocated."

[104] Motorola comments at 6-7.

[105] COMSAT comments at 7-12.

B. Other WRC-95 Issues

1. Space Services

68. Earth Stations in the 2025-2110 MHz Band. WARC-92 upgraded to primary the status of the space research, space operation, and Earth exploration-satellite services in the 2025-2110 MHz band. This band is also allocated internationally for primary fixed and mobile use. In the United States, the 2025-2110 MHz band is allocated to the mobile service on a primary basis and is generally used for electronic news gathering purposes. To facilitate shared use of this band, item 2.2 of the WRC-95 agenda provides for consideration of power limits for Earth stations in the Earth exploration-satellite, space research, and space operation services.

69. Currently, RR 2541 specifies power limits for space services and Earth stations operating in a number of frequency bands shared by space and terrestrial services. The 2025-2110 MHz band, however, is not included in this provision. Accordingly, ITU-R Joint Ad Hoc Working Party (JWP) 7B/9D was tasked with developing appropriate power limits for Earth stations operating in this band. Recently, JWP 7B/9D reached a consensus that the power limits given in No. 2541 are appropriate to apply to the 2025-2110 MHz band.[106] The IAC and NTIA's RCS have developed draft language to implement these power limits by adding No. 2544 *bis* to Article 28 of the Radio Regulations to read as follows:

> ADD 2544 *bis* (6) As an exception to the limits given in No. 2541, the equivalent isotropically radiated power (e.i.r.p.) towards the horizon for an earth station in the Earth exploration-satellite service, space research service and space operation service in the 2025-2110 MHz band shall not exceed +XXdBW in any 4 kHz band.

70. The IAC continues to address this subject. CTA, Incorporated, the only commenter to address this issue, supports consideration of guidelines for sharing

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[106] The power limits in No. 2541 are:

> +40 dBW in any 4 kHz band for $\Theta \leq 0°$
> +40+3Θ dBW in any 4 kHz band for $0° < \Theta \leq 5°$

where Θ is the angle of elevation of the horizon viewed from the center of radiation of the antenna of the earth station and measured in degrees as positive above the horizontal plane and negative below it.

within this band.[107] We renew our request for comments on this issue -- specifically whether the RR 2541 limits are appropriate.

71. Fixed Satellite Service Use of the Band 13.75-14.0 GHz. WARC-92 made a primary allocation for FSS in the 13.75-14.0 GHz band. This band is shared with the radiolocation and radionavigation services and is available on a secondary basis for the space research, Earth exploration-satellite, and standard frequency and time- signal satellite services. To facilitate shared use of this band, WARC-92 adopted footnote RR 855A to the international Radio Regulations that specifies technical criteria for primary services in this band.[108] Resolution 112 (WARC-92) resolves that the criteria specified in RR 855A be studied and that studies be conducted on the technical compatibility between FSS and secondary allocations in the 13.75-14.0 GHz band.

72. ITU-R Task Group 4/4 has completed its technical studies relative to RR 855A and has confirmed that the RR 855A values are appropriate. In Recommendation ITU-R S.1068, it provides further details on FSS sharing with the radiolocation and radionavigation services. In addition, WARC-92 adopted footnote RR 855B granting equal status with FSS operations to geostationary space stations in the space research service that were advance published prior to January 31, 1992. Radio Regulation 855B also stipulates that FSS stations shall not cause harmful interference to non-geostationary stations in the space research service prior to January 1, 2000.

73. ITU-R Task Group 7/3 studied the compatibility between FSS and other services in the 13.75-14.0 GHz band taking into consideration RR 855B. The group developed criteria necessary to provide protection to non-FSS services. Task Group 4/4 developed constraints on FSS operations to provide the necessary protection. As a result of their efforts, the two groups developed recommendations ITU-R S.1069 and ITU-R SA.1071 setting forth the sharing criteria for the band. In considering Item 2.3 on the WRC-95 Agenda, the CPM determined that all studies necessary to satisfy Resolution 112 have been performed and that the above Recommendations contain the appropriate sharing criteria.

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[107] CTA reply comments at 3.

[108] These criteria include minimum and maximum e.i.r.p. values of 68 dBW and 85 dBW respectively, and a minimum antenna diameter of 4.5 meters for earth stations in the fixed-satellite service. Footnote 855A also provides a maximum e.i.r.p. value for stations in the radiolocation and radionavigation services.

74. COMSAT World and Hughes support the work of Task Groups 4/4 and 7/3 and urge approval of their conclusions.[109] The IAC and NTIA, on behalf of participating federal government agencies, concur and they have developed draft proposals consistent with these conclusions.[110] These draft proposals modify RR 855A and 855B to eliminate references to Resolution 112 and future studies on technical criteria. They add to RR 855A a reference to Recommendation ITU-R S.1068 and add references to Recommendations ITU-R S.1069 and ITU-R SA.1071 to RR 855B. Finally, their draft proposals suppress Resolution 112 as no longer necessary.

75. We note that there appears to be general agreement on the values affirmed by the relevant ITU-R groups and on the suppressions of Resolution 112. As an initial matter, we accept the IAC's recommendation on this issue and incorporate it as Proposal No. 4/SS, Appendix 1. However, we invite comment, noting that RR 855A stipulates that after 1 January 2000, non-geostationary space stations in the space research and Earth exploration-satellite service will operate on a secondary basis relative to the fixed-satellite service.

76. Space Services Allocations. Agenda item 3 for WRC-95 provides for consideration of Resolution 712 (WARC-92), with a view towards taking action at WRC-97. The following issues relating to space science services are considered under Resolution 712: (1) providing worldwide primary allocations for the Earth-exploration and space research services in appropriate bands within the 8-20 GHz range; (2) satisfying inter-satellite service requirements for up to 50 MHz of spectrum near 23 GHz; (3) providing up to 1 GHz of spectrum for space-based active Earth sensors around 35 GHz; and 4) including certain CCIR-approved space science service coordination parameters in Appendix 28 of the Radio Regulations. Technical studies are currently underway regarding each of these issues, including spectrum requirements, the allocation status of these services in various bands, and the feasibility of sharing between services. No parties commented on this issue in response to the Notice. A detailed discussion of these issues and the status of

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[109] COMSAT World comments at 6; Hughes comments at 3-4. Hughes has pending before the FCC an application (File Nos. 47-DSS-P/LA-94; CSS-94-018) for authority for a separate international fixed communications satellite to provide digital video distribution to Latin America. Hughes proposes to make use of the 13.75-14.0 GHz band for uplink transmissions from the U.S. and Latin America.

[110] See IAC Interim Report at 184; Initial Federal Government Draft Recommended Proposals (NTIA Draft Proposals), Dept. of Commerce, National Telecommunications and Information Administration, Nov. 8, 1994, at Document No. 4.

considerations is contained in the IAC's Interim Report.[111] Parties are invited to address these issues, bearing in mind that substantive action is planned for WRC-97.

2. Appendices 30 and 30A

77. WRC-95 agenda item 3a provides for consideration of Appendices 30 and 30A (Plans and procedures for the broadcasting-satellite service and associated feeder links, respectively) for Regions 1 and 3 in response to Resolution 524 (WARC-92). WRC-95 is directed to review related work being carried out in ITU Study Groups, with WRC-97 taking appropriate substantive action. At WRC-93, the U.S.'s primary concern was that the Region 2 Plan not be affected by modifications to the Plans of other Regions. This concern is reflected in WRC-93's direction that particular attention be given to 'resolves 2' of Resolution 524.[112] Item 3a also provides for consideration of Appendix 30B. This would allow an administration to implement its FSS allotment with the same satellite used for its BSS allotment under Appendices 30 and 30A.[113] In addition, the VGE proposes changes that affect the content and format of Appendices 30 and 30A.

78. The IAC has addressed both the VGE's Final Report as it relates to this subject and WRC-95 agenda item 3a. In its Interim Report, the IAC notes that VGE Recommendation Nos. 2/3, 2/5, and 2/6 would eliminate the Plans for BSS and associated feeder links and disperse their provisions and procedures throughout the Radio Regulations. It questions whether this is a useful 'simplification' and maintains that it would be premature to apply the VGE's recommendations since WRC-95 will consider major revisions to Appendices 30 and 30A. Furthermore, the IAC suggests that the recommendations might be used as a model for revisions of the Appendices at WRC-97.[114]

79. The IAC also states that in determining the impact on the Region 2 Plans of revising the Region 1 and 3 Plans (and associated inter-Regional sharing criteria), it is critical to note that BSS systems actually implemented in Region 2 differ from those described in the Region 2 Plan. These differences, it contends, could make operating BSS systems in Region 2 more vulnerable to interference from BSS

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[111] Id. at 187-91.

[112] Resolves 2 of Resolution 524 directs future conferences to ensure the integrity of the Region 2 Plan by providing the same level of protection to Region 2 assignments and not requiring additional protection from Region 2 assignments if other Plan are modified.

[113] See Notice, 9 FCC Rcd at 2436.

[114] IAC Interim Report at 35-36.

and FSS systems in the other Regions. The IAC maintains that unless modifications are made to the Region 2 Plan to reflect systems being implemented, Regions 1 and 3 would not be required to provide inter-Regional protection. In this regard, it observes that it might also be desirable to modify inter-Regional sharing criteria on a reciprocal basis.[115]

80. To preserve the United States's interests, the IAC recommends the following actions:

- oppose adoption of VGE Recommendation Nos. 2/3, 2/5 and 2/6;
- participate actively in options for revising the Plans in Regions 1 and 3, with two objectives:
  1) to ensure equitable assignments for U.S. territories in Region 3;
  2) to protect Region 2 assignments as implemented from revised assignments for Regions 1 and 3; and
- not oppose the adoption of new inter-Regional sharing criteria or new orbital assignments that permit co-location of BSS and FSS assignments (Appendix 30B aspect).[116]

81. In comments responding to the Notice, Hughes notes that U.S. BSS systems would be vulnerable to interference from systems in Regions 1 and 3.[117] Both Hughes and USSB comment that the U.S. should participate in studies being undertaken pursuant to Resolution 524 by ITU-R Working Party 10-11S and CPM-95.[118] Hughes also remarks that the impact of taking account of Appendix 30B in revising the Plans of Regions 1 and 3 should be negligible.[119]

82. We request further comment on the above including the IAC's recommendations. Parties should note the work being conducted by ITU-R Working Party 10-11/S in preparation for substantive actions at WRC-97. Specifically, suggestions have been made to change Appendix 30/30A and Resolution 42 to

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[115] Id. at 33-34.

[116] Id. at 37.

[117] Hughes comments at 8.

[118] Id. at 9; USSB comments at 3-4.

[119] Hughes comments at 9-10.

modify inter-regional sharing criteria as well as service implementation procedures and methods to provide additional flexibility to accommodate new direct broadcast satellite (DBS) technologies and services. Comment is also requested on whether the U.S. should propose to WRC-95 that WRC-97 be given appropriate limited competence to revise the Radio Regulations to ensure that these recommendations apply to Region 2.

3. High Frequency Broadcasting

83. WRC-95 Agenda Item 3c addresses the availability of High Frequency Broadcasting (HFBC) bands allocated at WARC-79 and WARC-92. The use of these bands was conditioned on the development of an acceptable worldwide planning system which has proven to be a difficult task due to excessive demand and limited HFBC spectrum. Since the Notice, the ITU has established Task Group 10/5 for the purpose of addressing planning procedures.

84. Task Group 10/5 has made significant progress. In its draft report, the group examines planning procedures associated with broadcasting and other radio services.[120] It enumerates guiding principles for a new planning procedure and describes the procedure for a new, simple, and flexible process for planning the HFBC bands. This approach is premised on the concept of seasonal coordination carried out at the regional level. Coordination is based on an agreed upon technical evaluation of the incompatibilities in the proposed broadcasting schedules. This technical evaluation is based on existing ITU-R Recommendations. This approach will be refined at subsequent meetings of Task Group 10/5 scheduled after WRC-95. The direction Task Group 10/5 takes appears to be consistent with U.S. interests.[121] Although the WRC-95 agenda does not provide for substantive action on this issue, Task Group 10/5's final report will likely be the basis for substantive action at WRC-97.[122] We invite further comment on the work of Task Group 10/5 and alternate approaches to facilitating the availability of HFBC bands.

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[120] ITU-R Document 10-5/TEMP/5, 1994 (Report to CPM-95).

[121] We note, however, that during recent Task Group 10/5 meetings, representatives of the Asian Broadcasting Union (ABU) and Japan expressed strong interest in global coordination meetings hosted by the ITU. At present, these entities do not participate in the coordination meetings where European and North American entities coordinate their frequency use and thus they find that their interests do not at present have an adequate forum for consideration.

[122] Task Group 10/5 also concluded that a suitable planning procedure for HF broadcasting will be produced and provided to WRC-97. Further, it recommends to WRC-95 that it hold in abeyance its review of the VGE Final Report's proposed revision of Article 17 (Article S12) until WRC-97. We request comments on these subjects.

85. Comments were received on an additional item regarding the HFBC issue.[123] Under the current WARC-92 constraints, only Single Side Band (SSB) transmissions can be used in this additional spectrum. This matter may be linked to the approval of a planning procedure at WRC-97. At present, SSB receivers are not widely available and represent a very small fraction of the HF receiver market. Also, the SSB receivers that are available are prohibitively expensive in many areas of the world. Commenters indicate that with the advent of new technologies, such as digital audio broadcasting (DAB), it may be unwise to impose a SSB standard without first giving further consideration to better long term alternatives. We request comments on the requirement of SSB transmissions in the new HFBC bands.

4. Review of the Final Report of the Voluntary Group of Experts

86. The Voluntary Group of Experts (VGE) was tasked by the ITU in 1989 to simplify the international Radio Regulations (RR) without making substantive alterations thereto.[124] The VGE divided its work into three areas: (1) Task 1 - Allocation Matters; (2) Task 2 - Procedural Matters Related to the Use of Frequencies; and (3) Task 3 - Operational and Administrative Matters. The VGE's Final Report will be reviewed by WRC-95, pursuant to item 1 of the WRC-95 agenda. WRC-95 will further undertake to make appropriate revisions to the Radio Regulations and to provide a timetable for implementation of any outstanding recommended actions.[125] The VGE recommends in the Final Report specific revisions to sections of the Radio Regulations and general guidelines for future development and administration of the Radio Regulations.[126] The U.S. generally supports the VGE and its efforts to simplify the international Radio Regulations and associated provisions.

87. In the Notice, we described the general approaches of the VGE for simplifying the Radio Regulations and invited parties to comment on those approaches and on specific VGE recommendations.[127] We further invited parties to identify foreseeable difficulties with any aspect of the VGE's work and, where possible, to propose alternative approaches and solutions.[128] The IAC has also been

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[123] See, e.g., comments of George Jacobs and Associates, Inc. at 6-7.

[124] See Final Acts of the Plenipotentiary Conference (Nice, 1989), Resolution 8.

[125] See Appendix 2, WRC-95 Agenda, Item 1.

[126] See Notice, 9 FCC Rcd at 2431-33.

[127] Id. Major portions of the VGE Final Report have been entered into the docket file of this proceeding and are available for public inspection.

[128] Id. at 2432-33.

asked to review the VGE's Final Report. NTIA's IRAC and its subordinate group, the Radio Conference Subcommittee (RCS), are also reviewing the VGE's work and developing preliminary draft U.S. proposals for WRC-95.[129] Their preliminary views were shared with the IAC.

88. Several parties express concern that full consideration of the VGE Report could consume too much of the time and resources of WRC-95 at the expense of affording full treatment of the other issues on agenda, most notably MSS. AMSC comments that "substantial danger exists that VGE deliberations will dominate WRC-95."[130] Further, some recommend that consideration of the VGE Final Report be deferred altogether until a future conference.[131] AMSC suggests that WRC-95 categorize the VGE issues according to service and then place specific issues for consideration on appropriate future WRC agendas.[132] Other commenters, such as Comsat Mobile Communications, propose that the VGE Final Report be addressed in a separate committee at WRC-95 so work can continue simultaneously on the other WRC-95 agenda items.[133] The Commission shares the commenters' concerns that adequate attention can be devoted at WRC-95 for considering issues besides the simplification of the Radio Regulations. Parties should note that it has not yet been determined to what extent and how WRC-95 or subsequent conferences might consider the VGE Final Report. That decision will likely develop at ITU meetings preparing for WRC-95 and will be finalized at the conference itself.

89. Other parties offer comment on specific VGE proposals. Aeronautical Radio, Inc. (ARINC) opposes VGE Recommendation No. 1/7 to allocate frequencies to more broadly defined service categories.[134] COMSAT World expresses concern that the VGE's "simplification" of notification, coordination, and registration procedures might serve to hinder implementation of satellite-based

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[129] See NTIA Draft Proposals.

[130] AMSC comments at 17; see also, e.g., COMSAT World comments at 7-9 (consideration of VGE item might consume "disproportionate share of WRC-95."); see also IAC Interim Report at 10.

[131] See AirTouch comments at 3-4; Loral comments at 20.

[132] See AMSC comments at 19.

[133] COMSAT Mobile comments at 32; COMSAT World reply comments at 10. Motorola disagrees that consideration of the VGE Report should be deferred but supports COMSAT World's and AMSC's ideas for controlling the conference's consideration of the item to preserve sufficient resources for full treatment of MSS issues. Motorola reply comments at 3-4.

[134] ARINC comments at 5-6.

telecommunications service.[135] The comments reflect differing views on whether the VGE's proposed Simplified Radio Regulations would improve the current interim procedures for coordination and notification of NGSO satellite networks contained in Res. 46.[136] We invite parties to submit any further comments on these identified issues or other concerns regarding the VGE's Final Report.

90. The IAC concludes in its Interim Report that the VGE has successfully carried the majority of the provisions of the international Radio Regulations forward to the Simplified Radio Regulations without change to the present registration process for frequency assignments.[137] The IAC also expresses general agreement with the preliminary views on this topic expressed by the federal government in the NTIA Draft Proposals.[138] Specific variances from the views of the VGE and the federal government are described in the Interim Report.[139]

91. Commission staff is continuing its own review of the VGE Final Report and is evolving preliminary draft U.S. proposals on this topic. In conjunction with these efforts, it will take into account the further views expressed by the IAC, the commenters, and NTIA. Parties are invited to comment on the IAC's recommendations and other VGE issues.

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[135] COMSAT World comments at 10-13.

[136] Motorola comments at 2-3; Orbcomm comments at 7; Starsys reply comments at 3-4. See also Notice, 9 FCC Rcd at 2432 n.9.

[137] IAC Interim Report at 10-11.

[138] Id.

[139] Id. at 11-37.

C. Planning for Future World Radiocommunication Conferences

1. 1997 World Radiocommunication Conference

92. In keeping with the ITU's new four-year planning cycle for WRCs, the 1993 conference developed a preliminary agenda for WRC-97.[140] In addition to urgent issues to be identified by WRC-95, the preliminary agenda provides for the consideration of the following items at WRC-97: (1) frequency allocations and regulatory aspects related to MSS including allocations for feeder links; (2) allocation issues for the space services -- specifically allocation of bands above 50 GHz to the Earth exploration-satellite (passive) service and allocations and associated provisions for the 399.9-400.05 MHz band; (3) HF bands allocated to the broadcasting service; (4) allocation issues concerning the aeronautical mobile (R) service in the band 136-137 MHz per Resolution 408 (Mob-87); (5) revisions to Chapters IX and N IX in accordance with Resolutions 200, 210, 330, 331 (Mob-87) taking into account the pending implementation of the global maritime distress and safety system (GMDSS); (6) use of Appendix 18 VHF frequency band for maritime mobile communications; (7) Article 61 relating to the priority of communications in the maritime mobile and the maritime mobile-satellite services; and (8) Appendices 30 and 30A for Regions 1 and 3 in response to Resolution 524 (WARC-92).[141]

93. The preliminary agenda also provides for consideration, at WRC-97, of the following outstanding resolutions and recommendations from past conferences: Resolution 60 (WARC-79) on revision of propagation information used in Appendix 28; Resolution 211 (WARC-92) on use by mobile service of frequency bands 2025-2110 MHz and 2200-2290 MHz; Resolution 710 (WARC-92) on primary service requirements for Met-Sat and Earth exploration-satellite services in band 401-403 MHz; and Resolution 712 (WARC-92) on issues dealing with allocations to space services which were not placed on the WARC-92 agenda;[142] Recommendation 66 (WARC-92) on studies of maximum permitted levels of spurious emissions;

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[140] Res. 2, WRC-93, Geneva, 1993. A copy of the Preliminary Agenda is attached to the Notice.

[141] See Appendix 3, WRC-97 Preliminary Agenda, Items 3.1-3.7.

[142] Consideration of Resolutions 211 and 712 (WARC-92) at a future WRC is preliminarily supported by the IAC. See IAC Interim Report at 233-34. Additionally, the IAC notes that Orbital Sciences Corporation has indicated its support of Resolution 712 and recommends establishment of a common primary allocation for Earth exploration-satellite service in the 8025-8400 MHz band on a worldwide basis with appropriate coordination parameters. Id. at 190, 204-05.

Recommendation 621 (WARC-92) on implementation of wind profiler radars;[143] Recommendation 711 (WARC-79) on coordination of Earth stations; and Recommendation 715 (Orb-88) on multi-band and/or multiservice satellite networks using the geostationary-satellite orbit.[144] Finally, WRC-97 is directed to recommend to the Council items for inclusion on the WRC-99 agenda and to provide its views on a preliminary agenda for the 2001 conference.

94. WRC-95 will review the WRC-97 preliminary agenda and recommend a final agenda to Council for its approval. WRC-95 will also recommend a preliminary agenda for WRC-99 and give its views on potential agenda items for future conferences.[145]

2. Suggested Topics for Future Conferences

95. In our first Notice in this proceeding, we remarked on the large number of issues identified on the preliminary agenda for consideration at WRC-97 and asked commenters to identify items that could be postponed for consideration at a future conference. Parties were also asked to address any additional items not appearing on the preliminary agenda that would be mature for consideration in 1997.[146] In response, some issues for possible consideration at future conferences were submitted. It should be initially noted that, with respect to WRC-97, there is broad agreement among the commenters that WRC-95 will be unable to fully accomplish all of the tasks on its broad agenda and that several of the issues will carry over to the 1997, and perhaps even to the 1999 conference.[147] Many parties therefore advocate limiting the placement of new items on the WRC-97 agenda to permit resolution of issues pending from WRC-95 -- particularly those relating to MSS allocations.[148] The

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[143] The Commission has pending a rule making proceeding related to this issue. See Notice of Proposed Rule Making and Notice of Inquiry, ET Docket No. 93-59, Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum for Wind Profiler Radar Systems, 8 FCC Rcd 2546 (1993).

[144] Commenters support consideration of Rec. 715 (Orb-88) at WRC-97. See COMSAT World comments at 19-20; COMSAT Mobile comments at 33-34; see also Teledesic comments at 13-16.

[145] See WRC-95 Agenda, Item 6.2.

[146] Notice, 9 FCC Rcd at 2437.

[147] See, e.g., Jacobs comments at 3; COMSAT World comments at 19-20; COMSAT Mobile comments at 33.

[148] See COMSAT World comments at 19-21; Starsys comments at 7; TRW comments at 12-13.

Intelligent Vehicle-Highway Society of America (IVHS America) seeks to add consideration of international IVHS (now known as Intelligent Transportation Systems or ITS) spectrum allocation issues to the agenda.[149] Teledesic recommends that WRC-97 address Recommendation 719 (WARC-92) concerning multiservice satellite networks using GSO in conjunction with its consideration of related Recommendation 715 (Orb-88).[150] AT&T seeks an allocation in 5.2 GHz band for mobile service on a worldwide basis to accommodate its proposed high-speed wireless data networks.[151]

96. The IAC is also considering the subject of future conference agendas. The section of its Interim Report that is devoted to this topic has not yet been fully developed, however, and its discussion is therefore quite preliminary. Further comment is welcome on the IAC's preliminary discussion. The IAC preliminarily recommends that WRC-97 consider the following additional items to facilitate MSS above 1 GHz: (1) continuing revision of Res. 46 based on experience gained from operating and coordinating NGSO MSS systems; (2) reviewing the effect of RR 2613 on these systems; (3) reviewing the constraints against MSS service link spectrum at 1-3 GHz to ensure availability of sufficient amounts to accommodate future growth; and (4) reviewing the amount of spectrum for NGSO MSS feeder links to ensure sufficient amounts are available in future for MSS on a worldwide basis.[152]

97. The IAC's Interim Report also identifies several potential subjects for future consideration relating to space services. It advises that WRC-97 consider allocating the 65.0-71.0 GHz band to the inter-satellite service (ISS) on a co-equal primary basis as an alternative to its present co-primary allocation in the 54.25-58.2 GHz band. The ISS will be used by commercial LEO satellite systems for their inter-satellite links and has the potential to interfere with passive earth sensors sharing the band. Specifically, the proposal is intended to protect passive sensing by the Earth exploration-satellite service of oxygen absorption lines that are unique to the 51.4-59.0 GHz band, for weather forecasting and climate studies.[153] The following additional suggestions for future conference items are also described in the IAC Interim Report: (1) upgrading the status of space research in the 410-420 MHz band;

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[149] IVHS comments at 3-4. These comments are supported by Securicor Datatrak Limited's comments at 2-3.

[150] See Teledesic comments at 13-16; COMSAT World comments at 9. See also Notice, 9 FCC Rcd at 2437 n. 46. But see Motorola reply comments at 20-21.

[151] AT&T reply comments at 3; see also IAC Interim Report at 221-22.

[152] IAC Interim Report at 232. Teledesic proposes to the IAC that a future conference may also need to resolve regulatory uncertainty concerning use of frequency bands allocated to FSS by NGSO FSS. Id. at 222-24.

[153] Id. at 234-35. Teledesic also supports this proposal. Id. at 203, 231-32.

(2) reviewing the allocation status for active space-based sensors; and (3) adopting sharing criteria between space services and fixed services in the 2025-2110 and 2200-2290 MHz bands.[154]

98. The IAC Interim Report includes the following additional suggestions which are of a very preliminary nature for consideration as future conference topics. Comments on these nascent proposals are specifically requested. The Telecommunications Industry Association (TIA) suggests consideration of additional international spectrum allocations for terrestrial land mobile services for public safety applications including possible reallocation of the 380-399.9 MHz band.[155] Intelligent Transportation Systems (ITS) proponents are considering frequency bands below 6 GHz for communications and a band above 40 GHz for vehicular collision avoidance. Noting European interest in the 5.8 GHz band, the ITS community has expressed a desire for international compatibility of systems.[156] We also invite comment on which bands would be appropriate for the above services.

99. As we have noted, under the four-year conference planning cycle, WRC-95 will adopt not only an agenda for WRC-97 (subject to Council's approval), but a preliminary agenda for WRC-99. The Notice therefore requested commenters to submit their views on issues for inclusion in the preliminary agenda for WRC-99.[157] Few parties addressed this topic, however. The American Radio Relay League requests that WRC-99 consider adoption of an international amateur radio permit, such as one currently under development by the Inter-American Telecommunications Commission (CITEL).[158] IVHS America posits that consideration of ITS spectrum allocation issues might carry over to the 1999 conference.[159]

100. The opportunity offered at WRC-95 to identify issues for consideration at future conferences is a significant one that should not be overlooked due to the press of current issues. We therefore renew our request and urge the parties to take advantage of this opportunity for long-range planning and to submit their views on issues for consideration at WRC-99 and beyond.

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[154] Id. at 232-35.

[155] Id. at 224-28. It should be noted, however, that the 380-400 MHz band is already allocated to the mobile service.

[156] Id. at 228-31.

[157] Notice, 9 FCC Rcd at 2438.

[158] ARRL comments at 8-9; see also IAC Interim Report at 235.

[159] IVHS America comments at 3-4.

D. Related Conference Preparatory Issues

1. 1995 Conference Preparation Meeting

101. Under the ITU's new structure, WRCs are preceded by Conference Preparatory Meetings (CPM) which assign tasks and studies relative to the agenda of the upcoming WRCs to the appropriate ITU study groups, working groups, and task groups. Based on the results of this work, the CPM prepares a comprehensive report to provide technical and other support for the associated WRCs.[160] CPM-94 convened in February, 1994. CPM-95 will be convened from March 22 to April 5, 1995, and will complete the technical report for WRC-95 and review the progress of preparatory studies for agenda items to be considered at WRC-97.[161] In addition, the Working Party of the CPM will meet from January 26 to 31, 1995, to consider regulatory and procedural aspects of the WRC-95 agenda. Commission staff are active participants in CPMs as well as in the meetings of the subordinate technical bodies performing the underlying work for the conferences. Commission staff are also attending the meetings of the Radiocommunication Advisory Group from January 23 to 27, 1995, in Geneva, that are considering, among other issues, the organizational structure of WRC-95.[162] Finally, staff will participate in the Radiocommunication Assembly (RA-95) which will be convened October 16 to 20, 1995 -- immediately prior to the commencement of WRC-95.[163]

2. Other International WRC Planning Activities

102. In addition to the above ITU activities directed towards preparing for WRC-95 and WRC-97, United States Delegations (including Commission staff) participate in other international fora which devote their attention to WRCs. For example, the Commission is an active participant in CITEL's recently formed Working Group for preparation of Regional and World Radiocommunication Conferences.[164]

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[160] See Notice, 9 FCC Rcd at 2438.

[161] See id.; see also Structure of the Consolidated Report of the ITU-R Conference Preparatory Meeting (CPM-95) to the World Radiocommunication Conference, 1995, ITU Document CPM-94/22, Geneva (1994).

[162] RAG-95 will also discuss the study of satellite coordination to be undertaken pursuant to Res COM 4/10, Plenipotentiary Conference, Kyoto, Oct.,1994. The study is to be considered preliminarily by WRC-95 with the final results to be reviewed by WRC-97. See Circular CA/12, Annex 1.

[163] See Resolution PLEN/17, Kyoto, 1994.

[164] See Res. 2 CITEL PCC.III (Radiocommunication), Ottawa, 1994.

CITEL offers great promise as a forum for developing joint Region 2 proposals for future WRCs and regional radiocommunication conferences. The views of CITEL and other organizations, such the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO), are being reviewed as part of the United States' overall effort to prepare for WRC-95. United States Delegations will also participate in bilateral discussions with other Administrations prior to WRC-95.

3. Preliminary U.S. Government Agency-Developed WRC-95 Proposals

103. Acting in parallel with this proceeding and the Commission's IAC process, the NTIA's Interdepartment Radio Advisory Committee (IRAC) and its Radio Conference Subcommittee (RCS) are coordinating the views of federal government agencies on WRC-95 agenda items with the purpose of developing their own preliminary proposals for the conference.[165] An initial draft of the NTIA Draft Proposals was informally transmitted to the Commission and the IAC for purposes of public consideration and facilitation of overall domestic development of U.S. proposals for WRC-95. The federal government agencies' recommended proposals resulting from this process, as well as the proposals culminating from the deliberations of the IAC and from this proceeding, will be fully coordinated with NTIA and the Department of State in formulating the final U.S. proposals. Commission staff generally agrees with the preliminary proposals that it has received thus far for review.

4. Conference Preparatory Processes

104. In the Notice, the Commission noted that in view of the ITU's restructuring and adoption of a regular WRC planning cycle, it might also be appropriate to modify the Commission's own planning and preparation processes and structures for future WRCs.[166] It observed that the new conference and planning cycle would require ongoing domestic preparations, particularly in light of the long lead time necessary for developing proposals for WRCs. Thus, in order to ensure continuing effective representation of U.S. interests, the Commission announced that it would consider establishing a permanent process for conference preparations.[167]

105. Since the release of the Notice, the Commission has reorganized its international and satellite functions, formerly contained in the Common Carrier

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[165] See Notice, 9 FCC Rcd at 2438 n.51. Although a representative from the Commission participates in IRAC and RCS meetings, the views expressed by these entities are their own and are not necessarily shared by the Commission.

[166] See Notice, 9 FCC Rcd at 2438.

[167] Id.

Bureau, Mass Media Bureau, Private Radio Bureau, Office of Engineering and Technology, Field Operations Bureau, and Office of International Communications, by consolidating them into a single operating bureau -- the International Bureau.[168] Within the new Bureau, an office has been established to continuously track the activities of the ITU's Radiocommunication Sector and to prepare for WRCs. That office, the Radiocommunication Policy Branch of the Satellite and Radiocommunication Division, includes permanent staff personnel with continuous conference planning responsibilities. The Bureau also plans to provide a consolidated international public reference room which will offer the public access to IAC and related documents to facilitate ongoing WRC preparations.[169]

106. The parties express general support of the Commission's recommendations contained in the Notice and offer additional ideas to improve the process.[170] COMSAT World suggests that the Commission create a WRC Preparatory Office to direct and coordinate all internal and external Commission preparations and that it name an Executive Coordinator for each of the next two WRCs.[171] It further proposes that the Commission create a permanent IAC structure whose leadership would change for each conference. Orbcomm advises the Commission to organize the preparatory process on an issue basis, with small government/industry teams focusing on specific allocation and regulatory matters.[172]

107. Several comments signalled a second theme -- a frustration with the current process which is closed to the public once final consultations among the Commission and federal government entities are underway to forge final U.S. proposals.[173] In a similar vein, AMSC recommends that the IAC process be modified to encourage broader participation of members from other government agencies -- particularly IRAC members -- and that the Commission consider establishing a joint committee of FCC and NTIA representatives that would be open to members of the private sector to jointly study issues under consideration for WRC agendas.[174]

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[168] See News Release, Report No. GN-167, released Oct. 12, 1994.

[169] See Public Notice, Relocation of International Bureau, released Jan. 20, 1995.

[170] See ARINC comments at 2-3; COMSAT World comments at 16; USSB comments at 2.

[171] COMSAT World comments at 17-18.

[172] Orbcomm comments at 13-14.

[173] See Jacobs comments at 3; AMSC comments at 24-25.

[174] AMSC comments at 23-25; see also ARRL comments at 10-11.

108. Finally, the IAC urges the Commission to create a "permanent" Industry Advisory Committee for WRC preparations in order to: (1) maintain inter-conference continuity of private sector input into WRC preparations; (2) establish a single repository for old and new WRC documents; and (3) assuage antitrust concerns of industry participants.[175] According to the IAC, a "permanent" IAC would mirror the federal agency preparatory process and would result in better prepared U.S. positions, proposals, and delegations.[176] The IAC does recognize, however, that the Federal Advisory Committee Act[177] limits industry advisory committees to two-year terms and that the President has requested agencies to institute such committees only when necessitated by "compelling circumstances."[178] The IAC suggests the Commission follow the success of the Industry Advisory Committee on Advanced Television Service,[179] for example, and seek timely and continuous renewal of the IAC to facilitate preparations for WRC-97 and beyond.[180] The Commission agrees that the IAC process is important to U.S. preparations and we intend to seek prompt renewal of the IAC's charter to prepare for future conferences. We note that federal government agency representatives are already active participants in the IAC, but agree that their continued participation should be encouraged. Finally, we also agree that broadening the opportunity for public participation in the process of negotiating final U.S. proposals is a worthy goal and should be considered further. Accordingly, further comment on all of these matters is requested.

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[175] IAC Interim Report at 242.

[176] Id. at 242-43.

[177] Pub. L. No. 92-463, 86 Stat. 770, codified at 5 U.S.C. App. II (1988).

[178] Executive Order 12838, 3 C.F.R. § 590 (1994). See IAC Interim Report at 242.

[179] 52 Fed. Reg. 38523 (1987).

[180] IAC Interim Report at 242.

IV. PROCEDURAL MATTERS

Ex Parte Rules - Exempt Proceeding

109. Pursuant to Section 1.1204(a)(4) of the Commission's Rules, 47 CFR § 1.204(a)(4), no *ex parte* restrictions apply to this proceeding.

Comment Dates

110. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before **March 6, 1995**, and to reply comments on or before **March 21, 1995**. To file formal comments in this proceeding, you must file an original plus four copies. If you would like each Commissioner to receive a personal copy, you must file an original and nine copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

Ordering Clause

111. Authority for issuance of this Second Notice of Inquiry is contained in Sections 154(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a).

Contact Persons

112. For further information concerning this proceeding, contact Damon C. Ladson, (202) 739-0510, or Audrey L. Allison, (202) 739-0557, of the International Bureau, Satellite and Radiocommunication Division.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX 1

RECOMMENDED UNITED STATES PROPOSALS -- PRELIMINARY FCC DRAFT

UNITED STATES PROPOSALS

for the

WORLD RADIOCOMMUNICATION CONFERENCE

(GENEVA, 1995)

Washington, D.C.

January, 1995

METHOD OF PRESENTATION

1. Services shown in all capital letters (*e.g.,* MOBILE-SATELLITE SERVICE) in the Allocation Table are services with primary status.

2. Services shown with an initial capital letter and the remaining letters in lower case (*e.g.,* Fixed) in the Allocation Table are services with secondary status.

3. Underlining (*e.g.,* Underlining) indicates new text proposed for adoption.

4. Strike-out text (*e.g.*) indicates existing text proposed for deletion.

5. NOC indicates provisions for which no change is proposed.

6. NOC indicates a matter of particular significance, for which it is important that no changes be made to the current provisions.

7. SUP indicates provisions that are proposed for suppression.

8. MOD indicates a proposed modification to the existing text.

9. (MOD) indicates proposed modifications that are strictly editorial in nature.

10. ADD indicates new provisions that are being proposed for addition.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

MHz
4800 - 5725

MOD

Allocation To Services		
Region 1	Region 2	Region 3
5000 - 5250	AERONAUTICAL RADIONAVIGATION FIXED-SATELLITE SERVICE (Earth-to-space) 797C MOD 796 797B 797D	

NOC 797B

MOD
733 The band 1610 - 1626.5 MHz is also allocated to the aeronautical mobile-satellite (R) service on a primary basis. Such use is subject to agreement obtained under the procedure set forth in Article **14**.

MOD
796 The band 5030 - 5091 MHz is to be used for the operation of the international standard system (microwave landing system) for precision approach and landing. The requirements of this system shall take precedence over other uses of this band. Future operations of MLS may extend into the 5000 - 5030 MHz band. Administrations should attempt to satisfy the needs of MLS in the 5030 - 5091 MHz band before expansion into the 5000 - 5030 MHz band. After January 1, 2015, the microwave landing system may also operate in the band 5091 -5120 MHz, if the requirements of the system in support of precision approach and landing cannot be met in the 5000-5030 and 5030 - 5091 MHz bands. In the event that microwave landing system operations extend beyond the 5030 - 5091 MHz band, the requirements of this system shall take precedence over other uses of the occupied bands.

SUP
797

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

SUP
797A

ADD
797C The use of the band 5000 - 5250 MHz (Earth-to-space) and 15.4 - 15.7 GHz (space-to-Earth) by the fixed-satellite service is limited to feeder links for non-geostationary satellite systems of the mobile-satellite service.

ADD
797D The use of the band 5000 - 5250 MHz (Earth-to-space) by the fixed-satellite service is subject to the application of the coordination and notification procedures set forth in Resolution 46 [suitably modified], for coordination between non-geostationary satellite networks (Earth-to-space) and between non-geostationary satellite networks (Earth-to-space) and terrestrial services.

REASON: To allocate spectrum specifically for feeder links to support mobile-satellite services provided from non-geostationary satellite networks. Suppression of Nos. 797 and 797A are consequential. Modification of No. 796 incorporates the alternative MLS expansion plan discussed internationally and articulates the transition plan with initial expansion (subject to need) into the 5000 - 5030 MHz band and subsequent expansion (subject to need) into the 5091 - 5120 MHz band.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

MHz
5725 - 7300

MOD

Allocation To Services		
Region 1	Region 2	Region 3
5925 - 6825	FIXED FIXED-SATELLITE (Earth-to-space) MOD 792A MOBILE 791 809	
6825 - 7075	FIXED FIXED-SATELLITE (Earth-to-space) MOD 792A (space-to-Earth) 809A MOBILE 809 809B	

NOC 791, 809

MOD

792A The use of the bands 4500 - 4800 MHz (space-to-Earth), 6725 - 7025 MHz (Earth-to-space), 10.7 - 10.95 GHz (space-to-Earth), 11.2 - 11.45 GHz (space-to-Earth) and 12.75 - 13.25 GHz (Earth-to-space), by the fixed-satellite service shall be in accordance with the provisions of Appendix **30B**.

ADD

809A The use of the bands 6825 - 7075 MHz (space-to-Earth) and 12.75 - 13.25 GHz (space-to-Earth) by the fixed-satellite service is limited to feeder links for non-geostationary satellite networks of the mobile-satellite service. The provisions of No. 2613 do not apply to these fixed-satellite service allocations for the (space-to-Earth) direction of transmission.

ADD

809B The use of the bands 6825 - 7075 MHz (space-to-Earth) and 12.75 - 13.25 GHz (space-to-Earth) by the fixed satellite service is subject to the application of the coordination and notification procedures set forth in Resolution 46 [suitably modified], for the coordination between geostationary satellite networks (Earth-to-space) and non-

geostationary satellite networks (space-to-Earth) and between non-geostationary satellite networks (space-to-Earth). Non-geostationary satellite networks shall not exceed the power flux-density limit at the geostationary-satellite orbit as specified in No. 2631. Coordination between non-geostationary satellite networks and terrestrial services in the band 6825 - 7075 MHz (space-to-Earth) is required only if the power-flux density produced at the Earth's surface exceeds the limits specified in No. MOD 2567 and in the band 12.75 - 13.25 GHz (space-to-Earth) if the power-flux density produced at the Earth's surface exceeds the limits specified in No. MOD 2575.

REASON: To allocate spectrum specifically for feeder links to support mobile-satellite services provided from non-geostationary satellite networks. Suppression of No. 791 in the 6825 - 7075 MHz band is consequential to allocation modification since No. 791 does not apply in this frequency band.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

GHz
10.7 - 12.75

MOD

Allocation To Services		
Region 1	Region 2	Region 3
10.7 - 10.95 FIXED FIXED-SATELLITE (space-to-Earth) MOD 792A (Earth-to-space) 792B MOD 835 835A MOBILE except aeronautical mobile 792C	**10.7 - 10.95** FIXED FIXED-SATELLITE (space-to-Earth) MOD 792A (Earth-to-space) 792B MOBILE except aeronautical mobile 792C	
10.95 - 11.2 FIXED FIXED-SATELLITE (space-to-Earth) (Earth-to-space) MOD 835 MOBILE except aeronautical mobile	**10.95 - 11.2** FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile	

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

11.2 - 11.45 FIXED FIXED-SATELLITE (space-to-Earth) MOD 792A (Earth-to-space) 792B MOD 835 835A MOBILE except aeronautical mobile 792C	11.2 - 11.45 FIXED FIXED-SATELLITE (space-to-Earth) MOD 792A (Earth-to-space) 792B MOBILE except aeronautical mobile 792C
11.45 - 11.7 FIXED FIXED-SATELLITE (space-to-Earth) (Earth-to-space) MOD 835 MOBILE except aeronautical mobile	11.45 - 11.7 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile

ADD

792B The use of the bands 10.7 - 10.95 GHz (Earth-to-space) and 11.2 - 11.45 GHz (Earth-to-space) by the fixed-satellite service is limited to feeder links for non-geostationary satellite networks of the mobile-satellite service except as provided by No. 835 for broadcasting-satellite service feeder links (Earth-to-space). The provisions of No. 2613 do not apply to these fixed-satellite service allocations in the Earth-to-space direction of transmission.

ADD

792C The use of the bands 10.7 - 10.95 GHz (Earth-to-space), and 11.2 - 11.45 GHz (Earth-to-space) by the fixed-satellite service for feeder links for non-geostationary satellite networks of the mobile-satellite service is subject to the coordination and notification procedures set forth in Resolution 46 [suitably modified] for the coordination between geostationary satellite networks (space-to-Earth) and non-geostationary satellite networks (Earth-to-space), between non-geostationary satellite networks (Earth-to-space), and between non-geostationary satellite networks (Earth-to-space) and terrestrial services.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

MOD

835 In Region 1, the band 10.7 - 11.7 GHz may also be used by the fixed-satellite service (Earth-to-space) for the provision of feeder links for the broadcasting-satellite service.

ADD

835A

The use of the fixed - satellite service band 10.7 - 10.95 GHz (Earth-to-space), and the fixed - satellite service band 11.2 - 11.45 GHz (Earth-to-space) in Region 1 for feeder links for the broadcasting-satellite service is subject to the coordination and notification procedures set forth in Resolution 46 [suitably modified] for the coordination between non-geostationary networks (Earth-to-space) and geostationary satellite networks (Earth-to-space) operating pursuant to No. MOD 835.

REASON: To allocate spectrum specifically for feeder links to support mobile-satellite services provided from non-geostationary satellite networks.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

GHz
12.75 - 14.3

MOD

Allocation To Services		
Region 1	Region 2	Region 3
12.75 - 13.25	FIXED FIXED-SATELLITE (Earth-to-space) MOD 792A (space-to-Earth) 809A MOBILE Space Research (deep space) (space-to-Earth) 809B	

REASON: To allocate spectrum specifically for feeder links to support mobile-satellite services provided from non-geostationary satellite networks.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

GHz
15.35 - 17.7

MOD

Allocation To Services		
Region 1	Region 2	Region 3
15.4 - 15.7	AERONAUTICAL RADIONAVIGATION FIXED-SATELLITE SERVICE (space-to-Earth) 797C 797E	

MOD
733 The band 1610 - 1626.5 MHz is also allocated to the aeronautical mobile-satellite (R) service on a primary basis. Such use is subject to agreement obtained under the procedure set forth in Article **14**.

SUP
797

ADD
797E The use of the band 15.4 - 15.7 GHz (space-to-Earth) by the fixed-satellite service is subject to the application of the coordination and notification procedures set forth in Resolution 46 [suitably modified], for coordination between non-geostationary satellite networks (space-to-Earth) and between non-geostationary satellite networks (space-to-Earth) and terrestrial services.

REASON: To allocate spectrum specifically for feeder links to support mobile-satellite services provided from non-geostationary satellite networks. Suppression of No 797 is consequential.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

GHz
18.8 - 22.21

MOD

Allocation To Services		
Region 1	Region 2	Region 3
18.8 - 18.9	FIXED FIXED-SATELLITE (space-to-Earth) MOBILE	
18.9 - 19.2	FIXED FIXED-SATELLITE (space-to-Earth) (Earth-to-space) 730B MOBILE 730C	
19.2 - 19.7	FIXED FIXED-SATELLITE (space-to-Earth) 730D MOBILE 730E	

ADD

730B The use of the band 18.9 - 19.2 GHz (Earth-to-space) by the fixed satellite service is limited to feeder links for non-geostationary satellite systems in the mobile-satellite service. The provisions of No. 2613 do not apply to these fixed-satellite allocations in the Earth-to-space direction of transmission.

ADD

730C The use of the band 18.9 - 19.2 GHz (Earth-to-space) by the fixed satellite service for feeder links for non-geostationary satellite networks is subject to the coordination and notification procedures set forth in Resolution 46 [suitably modified] for the coordination between geostationary satellite networks (space-to-Earth) and non-geostationary satellite networks (Earth-to-space), between non-geostationary satellite networks (Earth-to-space), and between non-geostationary satellite networks (Earth-to-space) and terrestrial services.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

ADD

730D The band 19.2 - 19.7 GHz (space-to-Earth) may also be used by the fixed-satellite service on a primary basis for feeder links for non-geostationary satellite systems in the mobile-satellite service. The provisions of No. 2613 do not apply to this fixed-satellite allocation in the space-to-Earth direction of transmission.

Note: We proposed to pair the 19.2-19.7 GHz band with 500 MHz of spectrum within the 27.5 - 29.5 GHz band. The most logical pairing would be with the 29.0-29.5 MHz band. However, the Commission is engaged in other reulemaking proceedings that could effect the availibility of the 29.0-29.5 MHz band for feeder links. Therefore, we request comment on both the 29.0-29.5 GHz and alternate 500 MHz segments within the 27.5-29.5 GHz range for pairing with the 19.2-19.7 GHz band. We include the 29.0-29.5 MHz band as an example '500 MHz' proposal.

ADD

730E The use of the band 19.2- 19.7 GHz (space-to-Earth) by the fixed-satellite service is subject to the application of the coordination and notification procedures set forth in Resolution 46 [suitably modified], for the coordination between geostationary networks (space-to-Earth) and non-geostationary satellite networks (space-to-Earth), between non-geostationary satellite networks (space-to-Earth) and between non-geostationary satellite networks (space-to-Earth) and terrestrial services. Emissions from non-geostationary space stations shall not exceed the power flux - density limits at the Earth's surface as specified in No. MOD 2578. Non-geostationary satellite space stations shall not exceed the power flux-density limit at the geostationary-satellite orbit as specified in No. 2631.

REASON: To allocate spectrum specifically for feeder links to support mobile-satellite services provided from non-geostationary satellite networks.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

GHz
25.25 - 29.5

MOD

Allocation To Services		
Region 1	Region 2	Region 3
28.5 - 29.0	FIXED FIXED-SATELLITE (Earth-to-space) 882D MOBILE Earth Exploration-Satellite (Earth-to-space) 882C 882B	
29.0 - 29.5	FIXED FIXED-SATELLITE (Earth-to-space) 882D 882F 882G MOBILE Earth Exploration-Satellite (Earth-to-space) 882C 882B 882E	

NOC 882B, 882C, 882D

ADD
882E The use of the band 29.0 - 29.5 GHz (Earth-to-space) for feeder links for the broadcasting-satellite service is subject to the coordination and notification procedures set forth in Resolution 46 [suitably modified] for the coordination between non-geostationary networks (Earth-to-space) and geostationary satellite networks (Earth-to-space) operating pursuant to No. 882D.

ADD
882F The band 29.0 - 29.5 GHz (Earth-to-space) may also be used by the fixed - satellite service on a primary basis for feeder links for non-geostationary satellite systems in the mobile-satellite service. The provisions of No. 2613 do not apply to this fixed-satellite allocation in the Earth-to-space direction of transmission.

ADD
882G The use of the band 29.0 - 29.5 GHz (Earth-to-space) by the fixed-satellite service is subject to the coordination and notification procedures set forth in Resolution 46 [suitably modified] for the coordination between geostationary satellite networks

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

(Earth-to-space) and non-geostationary satellite networks (Earth-to-space), between non-geostationary satellite networks (Earth-to-space), and between non-geostationary satellite networks (Earth-to-space) and terrestrial services.

Note: We proposed to pair the 19.2-19.7 GHz band with 500 MHz of spectrum within the 27.5 - 29.5 GHz band. The most logical pairing would be with the 29.0-29.5 MHz band. However, the Commission is engaged in other reulemaking proceedings that could effect the availibility of the 29.0-29.5 MHz band for feeder links. Therefore, we request comment on both the 29.0-29.5 GHz and alternate 500 MHz segments within the 27.5-29.5 GHz range for pairing with the 19.2-19.7 GHz band. We include the 29.0-29.5 MHz band as an example '500 MHz' proposal.

REASON: To allocate spectrum specifically for feeder links to support mobile-satellite services provided from non-geostationary satellite networks.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

MOD
ARTICLE 28

Proposed modification of No. 2567 b) and addition of No. 2567 c) to Article 28 of the Radio Regulations regarding the power flux-density limits between 3400 MHz and 7750 MHz.

MOD
2567 b) The power flux-density at the Earth's surface produced by emissions from a space station which operates as a feeder link for a mobile-satellite service network in the fixed-satellite service in the band 6825 - 7075 MHz (space-to-Earth), for all conditions and for all methods of modulation, shall not exceed the following values:

-154 dB(W/m^2/4 kHz) for arrival angles 0° to 5°;
-144 dB(W/m^2/4 kHz) for arrival angles 5° to 90°.

c) The limits given in No. 2566 apply in the frequency bands listed in No. 2568 which are allocated to the following space radiocommunication services:

- fixed-satellite service (space-to-Earth)
- meteorological - satellite service (space-to-Earth)
- mobile - satellite service
- space research service

for transmission by space stations where these bands are shared with equal rights with the fixed or mobile service.

Proposed modification of No. 2573 and addition of No. 2575 c) to Article 28 of the Radio Regulations regarding the power flux-density limits between 12.2 GHz and 13.25 GHz.

MOD
2573 (6) Power flux-density limits between 12.2 GHz and 13.25 GHz.

MOD
2575 b) The power flux-density at the Earth's surface produced by emissions from a space station which operates as a feeder link for a mobile-satellite service

network in the fixed-satellite service in the band 12.75 - 13.25 GHz (space-to-Earth), for all conditions and for all methods of modulation, shall not exceed the following values:

-148 dB(W/m^2/4kHz) for arrival angles 0° to 5°;
-138 dB(W/m^2/4kHz) for arrival angles 5° to 90°.

c) The limits given in No. 2574 apply in the frequency bands indicated in No. 2576 which are allocated to the fixed - satellite service for transmission by space stations where these bands are shared with equal rights with the fixed or mobile service.

Proposed addition of No. 2578 b) and modification of No. 2579 to Article 28 of the Radio Regulations regarding the power flux-density limits between 17.7 GHz and 19.7 GHz.

MOD

2578 a) The power flux-density at the Earth's surface produced by emissions from a space station, including emission from a reflecting satellite, for all conditions and for all methods of modulation, shall not exceed the following values:

- 115 dB(W/m^2) in any 1 MHz band for angles of arrival between 0 and 5 degrees above the horizontal plane;

- 115 + 0.5(δ - 5)dB(W/m^2) in any 1 MHz band for angles of arrival δ (in degrees) between 5 and 25 degrees above the horizontal plane;

- 105 dB(W/m^2) in any 1 MHz band for angles of arrival between 25 and 90 degrees above the horizontal plane.

These limits relate to the power flux-density which would be obtained under assumed free-space propagation conditions.

b) The power flux-density at the Earth's surface produced by emissions from a space station which operates as a feeder link for a mobile-satellite service network in the fixed-satellite service in the band 19.2 - 19.7 GHz (space-to-Earth), for all conditions and for all methods of modulation, shall not exceed the following values:

-115 dB(W/m^2/MHz) for arrival angles 0° to 5°;

-105 dB(W/m^2/MHz) for arrival angles 5° to 90°.

These limits relate to the power flux-density which would be obtained under assumed free-space propagation conditions.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 1/FL-MSS

MOD
2579 c) The limits given in No. 2578 apply in the frequency band listed in No. 2580 which are allocated to the following space radiocommunication services:

- fixed-satellite service (space-to-Earth)

- earth exploration - satellite including meteorological - satellite service (space-to-Earth)

for transmission by space stations where this band is shared with equal rights with the fixed or mobile service.

REASON: Proposals for Nos. 2567, 2573, 2575, 2578, and 2579 facilitate the sharing between the non-geostationary satellite networks providing MSS feeder links and other radio services operating in the frequency band.

MOD
ARTICLE 29

Proposed modification of No. 2631 of Article 29 of the Radio Regulations, Section V., Power Flux-Density at the Geostationary-Satellite Orbit.

MOD
2631 § 6. a) In the frequency band 8025 MHz - 8400 MHz which the earth exploration - satellite service using non-geostationary satellites shares with the fixed - satellite service (Earth-to-space) or the meteorological - satellite service (Earth-to-space), the maximum power flux-density produced at the geostationary-satellite orbit by any earth exploration - satellite service space station shall not exceed -174 dB(W/m^2) in any 4 kHz band.

b) In the frequency bands 6825 - 7075 MHz (space-to-Earth) and 12.75 - 13.25 GHz (space-to-Earth) which feeder link networks of the mobile-satellite service share with the fixed-satellite service (Earth-to-space), the maximum power flux-density produced at the geostationary-satellite orbit by any feeder link network space station shall not exceed -168 dB(W/m^2) in any 4 kHz band. These values apply within +/- 5° of the geostationary-satellite orbit.

REASON: Proposals for No. 2631 facilitates the sharing between the non-geostationary satellite networks providing MSS feeder links and other radio services operating in the frequency band.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 2/L-LEO

Proposal to Amend
Article 8 of the Radio Regulations

MOD **MHz**
137 - 137.825

Allocation to Services		
Region 1	Region 2	Region 3
137 - 137.025	SPACE OPERATION (space to Earth) 599X METEOROLOGICAL SATELLITE (space to Earth) 599X MOBILE-SATELLITE (space-to-Earth) 599B SPACE RESEARCH (space to Earth) 599X Fixed Mobile except aeronautical mobile (R) 596 597 598 599 599A	

137.175 - 137.825	SPACE OPERATION (space to Earth) 599X METEOROLOGICAL SATELLITE (space to Earth) 599X MOBILE-SATELLITE (space-to-Earth) 599B SPACE RESEARCH (space to Earth) 599X Fixed Mobile except aeronautical mobile (R) 596 597 598 599 599A

NOC 596, 597, 598, 599, 599A

ADD 599X Space operation, meteorological satellite service and space research will be co-primary until [1 January 2006], and secondary until [1 January 2010] to protect continuing operations.

Reason
To recognize the movement of space operations, meteorological satellite and space research systems to other segments of the 137 - 138 MHz band and to provide protection to these services during the transition period. Note, however, that in October 1994, Congress mandated that DoD and NOAA combine their polar orbiting meteorological satellite programs. This convergence, as well as the potential convergence with similar European meteorological satellite programs, is in the planning stage and the characteristics and

frequencies of operation of new satellites are not defined. Consequently, the time frame for migrating meteorological satellites from the 137-137.025 MHz and 137.175-137.825 MHz band is still under discussion. Therefore, the years 2006 and 2010, referenced in the text above, appear in square brackets in the attached proposal for the 137-138 MHz band.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 2/L-LEO

MOD **MHz**
148 - 150.05

Allocation to Services		
Region 1	Region 2	Region 3
148-149.9 FIXED MOBILE except aeronautical mobile (R) MOBILE-SATELLITE (Earth-to-space) MOD599B 608 MOD608A 608C	**148-149.9** FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) MOD599B 608 MOD608A 608C	
149.9-150.05 MOBILE-SATELLITE (Earth-to-space) MOD599B MOD609B RADIONAVIGATION- SATELLITE MOD608B 609 609A		

NOC 608, 608C, 609, 609A

MOD 599B
WARC-92 The use of the bands 137 - 138 MHz, 148 -149.9 MHz, 149.9 - 150.05 MHz, 399.9 - 400.05 MHz and 400.15 - 401 MHz by the mobile-satellite service is limited to non-geostationary-satellite systems.

MOD 608A
WARC-92 . Administrations using mobile earth stations in the mobile satellite service shall use the coordination distance threshold method in Recommendation (WP 8D)/TEMP/35 Rev.1) to determine coordination distance thresholds outside national boundaries.

MOD 608B

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 2/L-LEO

WARC-92 The use of the bands 149.9-150.05 MHz and 399.9 - 400.05 MHz by the mobile-satellite service is subject to the application of the coordination and notification procedures set forth in Resolution **46 (WARC-92)**. The mobile-satellite service shall not constrain the development and use of the radionavigation-satellite service in the 149.9-150.05 MHz and 399.9 - 400.05 bands .

MOD 609B

WARC-92 In the band 149.9-150.05 MHz, the allocation to the mobile-satellite service shall be on a secondary basis until 1 January 1997.

Reason

To allow for maximum flexibility in system implementation the land mobile satellite allocation in the 149.9 - 150.05 MHz band is proposed for any Mobile Satellite service. Modification to No. 608A was required because the -150 dB(W/m^2/kHz) has proven to be operationally unusable. The coordination distance threshold is a more useful approach to facilitate coordination across national boundaries. The removal of 'land' in Footnotes 608B and 609B reflects the change in the allocation table to Mobile Satellite service. The removal of -150 dB(W/m^2/4 kHz) power flux density maximum in No. 608B reflects the fact that there are no fixed or mobile services in this band.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 2/L-LEO

MOD **MHz**
399.9-400.05

Allocation to Services		
Regions 1	Region 2	Region 3
399.9-400.05 RADIONAVIGATION SATELLITE MOBILE SATELLITE (Earth-to-space) 609 645B MOD599B MOD608B		

NOC 609, 645B

Reason
In the 399.9 - 400.05 MHz band the TRANSIT system is being phased out of this band making it available for an Mobile Satellite service allocation.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 3/B-LEO

MOD

MHz
1525 - 1530

Allocation to Services		
Region 1	Region 2	Region 3
1525 - 1530 SPACE OPERATION (space-to-Earth) FIXED MOBILE-SATELLITE (space-to-Earth) Earth Exploration-Satellite Mobile except aeronautical mobile 724 722 723B 725 726A 726D	**1525 - 1530** SPACE OPERATION (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) Earth Exploration-Satellite Fixed Mobile 723 722 723A 726A 726D	**1525 - 1530** SPACE OPERATION (space-to-Earth) FIXED MOBILE-SATELLITE (space-to-Earth) Earth Exploration-Satellite Mobile 723 724 722 726A 726D

NOC 722, 723, 723A, 723B, 724, 725, 726A, 726D

SUP 726B

Reason
To make allocations for Mobile Satellite service.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 3/B-LEO

MOD

MHz
1530 - 1533

Allocation to Services		
Region 1	Region 2	Region 3
1530 - 1533 SPACE OPERATION (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) Earth Exploration-Satellite Fixed Mobile except aeronautical mobile 722 723B 726A MOD726C 726D	**1530 - 1533** SPACE OPERATION (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) Earth Exploration-Satellite Fixed Mobile 723 722 726A MOD726C 726D	

MOD 726C In the bands 1530 - 1544 MHz and 1626.5 - 1645.5 MHz, the maritime mobile-satellite distress and safety communications shall have priority access and immediate availability over all other mobile-satellite communications operating under this provision. Communications of mobile-satellite system stations not participating in the global maritime distress and safety system (GMDSS) shall operate on a secondary basis to distress and safety communications of stations operating in the GMDSS. Account shall be taken of the priority of safety-related communications in the other mobile-satellite services.

Reason
To make allocations generic and to provide priority access and immediate availability for maritime distress and safety communications.

MOD

MHz
1533 - 1559

Allocation to Services		
Region 1	Region 2	Region 3
1533 - 1535 SPACE OPERATION (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) Earth Exploration-Satellite Fixed Mobile except aeronautical mobile 722 723B 726A MOD726C 726D	**1533 - 1535** SPACE OPERATION (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) Earth Exploration-Satellite Fixed Mobile 723 722 726A MOD726C 726D	
1535 - 1544 MOBILE-SATELLITE (space-to-Earth) 722 726A MOD726C 726D 727		
1544 - 1545 MOBILE-SATELLITE (space-to-Earth) 722 726D 727 727A		
1545 - 1555 MOBILE-SATELLITE (space-to-Earth) 722 726A 726D 727 729 730 MOD730C		
1555 - 1559 MOBILE-SATELLITE (space-to-Earth) 722 726A 726D 727 730 MOD730C		

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 3/B-LEO

NOC 727, 727A, 729, 730

SUP 729A

SUP730A

MOD 730C In the bands 1545 - 1559 MHz and 1646.5 - 1660.5 MHz, the aeronautical mobile-satellite (R) service shall have priority access and immediate availability over all other mobile-satellite communications within a network operating under this provision; mobile-satellite systems shall be interoperable with the aeronautical mobile-satellite (R) service; account shall be taken of the priority of safety-related communications in the other mobile-satellite services.

SUP 730B

Reason
To make allocations availiable for all Mobile Satellite services and to provide priority access and immediate availability for aeronautical and maritime distress and safety communications.

MHz

MOD 1610 - 1626.5

Allocation of Services		
Region 1	Region 2	Region 3
1610 -1610.6 MOBILE-SATELLITE (Earth-to-space) AERONAUTICAL RADIONAVIGATION 722 727 730 731 MOD731E 732 733 733A 733B 733E 733F	**1610 -1610.6** MOBILE-SATELLITE (Earth-to-space) AERONAUTICAL RADIONAVIGATION RADIODETERMINATION-SATELLITE (Earth-to -space) 722 MOD731E 732 733 733A 733C 733D 733E	**1610 -1610.6** MOBILE-SATELLITE (Earth-to-space) AERONAUTICAL RADIONAVIGATION Radiodetermination-Satellite (Earth-to -space) 722 727 730 731 MOD731E 732 733 733A 733B 733E
1610.6 - 1613.8 MOBILE-SATELLITE (Earth-to-space) RADIO ASTRONOMY AERONAUTICAL RADIONAVIGATION 722 727 730 731 MOD731E 732 733 733A 733B 733E 733F 734	**1610.6 - 1613.8** MOBILE-SATELLITE (Earth-to-space) RADIO ASTRONOMY AERONAUTICAL RADIONAVIGATION RADIODETERMINATION-SATELLITE (Earth-to-space) 722 MOD731E 732 733 733A 733C 733D 733E 734	**1610.6 - 1613.8** MOBILE-SATELLITE (Earth-to-space) RADIO ASTRONOMY AERONAUTICAL RADIONAVIGATION Radiodetermination-Satellite (Earth-to -space) 722 727 730 731 MOD731E 732 733 733A 733B 733E 734
1613.8 -1626.5 MOBILE-SATELLITE (Earth-to-space) AERONAUTICAL RADIONAVIGATION Mobile-Satellite (space-to-Earth) 722 727 730 731 MOD731E 731F 732 733 733A 733B 733E 733F	**1613.8 -1626.5** MOBILE-SATELLITE (Earth-to-space) AERONAUTICAL RADIONAVIGATION RADIODETERMINATION-SATELLITE (Earth-to -space) Mobile-Satellite (space-to-Earth) 722 MOD731E 731F 732 733 733A 733C 733D 733E	**1613.8 -1626.5** MOBILE-SATELLITE (Earth-to-space) AERONAUTICAL RADIONAVIGATION Radiodetermination-Satellite (Earth-to -space) Mobile-Satellite (space-to-Earth) 722 727 730 731 MOD731E 731F 732 733 733A 733B 733E

NOC 731 731F 732 733 733A 733B 733E 733F 734

MOD 731E The use of the band 1610-1626.5 MHz by the mobile-satellite service (Earth-to-space) and by the radiodetermination-satellite service (Earth-to-space) is subject to the application of the coordination and notification procedures set forth in Resolution **46 (WARC-92)**. A mobile earth station operating in either of the services in this band shall not produce a mean e.i.r.p. density in excess of -15 dB (W/4 kHz) in the part of the band used by systems operating in accordance with the provisions of No. **732**, unless otherwise agreed by the affected administrations. In the part of the band where such systems are not operating, a value of -3 dB (W/4 kHz) is applicable. Application of the provisions of No. **953** apply to the use of the 1610 - 1626.5 MHz band.

Reason

Inclusion of the term "mean" is intended to clarify how the e.i.r.p. density limit should be measured. The text proposed for deletion at the end of this provision is unnecessary to protect the primary allocation status of the identified services and creates confusion and ambiguity concerning the primary status of the mobile-satellite service in the 1610-1626.5 MHz band.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 3/B-LEO

MOD

MHz
1626.5 - 1660.5

Allocation to Services		
Region 1	Region 2	Region 3
1626.5 - 1631.5 MOBILE-SATELLITE (Earth-to-space) 722 726A MOD726C 726D 727 730	**1626.5 - 1631.5** MOBILE-SATELLITE (Earth-to-space) 722 726A MOD726C 726D 727 730	
1631.5 - 1634.5 MOBILE-SATELLITE (Earth-to-space) 722 726A MOD726C 726D 727 730		
1634.5 - 1645.5 MOBILE-SATELLITE (Earth-to-space) 722 726A MOD726C 726D 727 730		
1645.5 - 1646.5 MOBILE-SATELLITE (Earth-to-space) 722 726D 734B		
1646.5 - 1656.5 MOBILE-SATELLITE (Earth-to-space) 722 726A 726D 727 730 MOD730C 735		
1656.5 - 1660 MOBILE-SATELLITE (Earth-to-space) 722 726A 726D 727 730 MOD730C		
1660 - 1660.5 RADIO ASTRONOMY MOBILE-SATELLITE (Earth-to-space) 722 726A 726D MOD730C 736		

NOC 734C

Reason

To make allocations availiable to all Mobile Satellite services and to provide priority access and immediate availability for aeronautical and maritime distress and safety communications.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 3/B-LEO

MHz

MOD **1675 - 1710**

Allocation to Services		
Region 1	Region 2	Region 3
1675 - 1690 METEOROLOGICAL AIDS FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile MOBILE SATELLITE (Earth-to-space) 722 735A		
1690 - 1700 METEOROLOGICAL AIDS METEOROLOGICAL SATELLITE (space-to-Earth) MOBILE-SATELLITE (Earth-to-space) Fixed Mobile except aeronautical mobile 671 722 741	**1690 - 1700** METEOROLOGICAL AIDS METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE-SATELLITE (Earth-to-space) 671 722 735A 740 742	
1700 - 1710 FIXED METEOROLOGICAL- SATELLITE (space-to-Earth) MOBILE- SATELLITE (Earth-to-space) Mobile except aeronautical mobile 671 722	**1700 - 1710** FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile MOBILE-SATELLITE (Earth-to-space) 671 722 735A 743	

NOC 671, 722, 740, 741, 742, 743, [735A]

Note: If ITU-R Working Party 7C's draft new Recommendation regarding sharing between MetSats and MSS is approved by the Radiocommunication assembly or prior to WRC-95, the

MetSat service could be suppressed from footnote 735A. Sharing between MetAids and MSS is also being addressed in Working Party 7C. If the appropriate sharing criteria are developed and approved for this situation, MetAids could also be suppressed. However, that work is not yet completed.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 3/B-LEO

MOD

MHz
1930 - 2025

Allocation to Services		
Region 1	Region 2	Region 3
1930 - 1945 FIXED MOBILE 746A	**1930 - 1945** FIXED MOBILE 746A	**1930 - 1945** FIXED MOBILE 746A
1945 - 1970 FIXED MOBILE 746A	**1945 - 1970** FIXED MOBILE Mobile-Satellite (Earth-to-space) 746A	**1945 - 1970** FIXED MOBILE 746A
1970 - 1980 FIXED MOBILE 746A	**1970 - 1980** FIXED MOBILE Mobile-Satellite (Earth-to-space) 746A MOD746B MOD746C	**1970 - 1980** FIXED MOBILE 746A
1980 -1985 FIXED MOBILE 746A	**1980 -1985** FIXED MOBILE Mobile-Satellite (Earth-to-space) 746A MOD746B MOD746C	**1980 -1985** FIXED MOBILE 746A
1985 - 2010	FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) 746A MOD746B MOD746C	

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 3/B-LEO

2010 - 2025	FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) 746A MOD746B

NOC 746A

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 3/B-LEO

MOD 746B The use of the bands 1985 - 2025 MHz and 2160 - 2200 MHz by the mobile-satellite service shall not commence before 1 January 2005 and is subject to the application of the coordination and notification procedures set forth in Resolution **46 (WARC-92)**. In the band 2160-2200 MHz coordination of space stations of the mobile-satellite service with respect to terrestrial services is required only if the power flux density or Fractional Degradation Percentage produced at the Earth's Surface exceeds the threshold , in Recommendation (TG 2-2/TEMP/89 (Rev2). In respect of assignments operating in this band, the provisions of Section II, paragraph 2.2 of Resolution 46 (WARC-92) shall also be applied to geostationary transmitting space stations with respect to terrestrial stations.

MOD 746C In the United States, the use of the bands 1985 -2025 MHz and 2160 - 2200 MHz by the mobile-satellite service shall not commence before 1 January 1996.

MOD **MHz**
2160 -2170

Allocation of Services		
Region 1	Region 2	Region 3
2160 - 2170 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 746A MOD746B MOD746C	**2160 - 2170** FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 746A MOD746B MOD746C	**2160 - 2170** FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 746A MOD746B MOD746C

Reason
To make allocations to the Mobile Satellite service on a global basis.

MOD

MHz
2483.5 - 2500

Allocation of Services		
Region 1	Region 2	Region 3
2483.5 - 2500 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) Radiolocation 733F 752 753 753A 753B 753C MOD753F	**2483.5 - 2500** FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) RADIOLOCATION RADIODETERMINATIO N-SATELLITE (space-to-Earth) 753A 752 753D MOD753F	**2483.5 - 2500** FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) RADIOLOCATION Radiodetermination- Satellite (space-to-Earth) 753A 752 753C MOD753F

NOC 733F, 752, 753, 753A, 753B, 753C

MOD 753F The use of the band 2483.5-2500 MHz by the mobile-satellite service and the radiodetermination-satellite service is subject to the application of the coordination and notification procedures set forth in Resolution **46 (WARC-92)**. Coordination of space stations of the mobile-satellite and radiodetermination-satellite services with respect to terrestrial services is required only if the power-flux density produced at the Earth's surface exceeds:

-150 dB (W/m^2) in any 4 kHz band for angles of arrival between 0 and 5 degrees above the horizontal plane;

-150 + 0.65 (δ-5) dB (W/m^2) in any 4 kHz band for angles of arrival δ (in degrees) between 5 and 25 degrees above the horizontal plane;

-137 dB (W/m^2) in any 4 kHz band for angles of arrival between 25 and 90 degrees above the horizontal plane.

These limits relate to the power flux-density which would be obtained under assumed free-space conditions. In respect of assignments operating in this band, the provisions of Section II, paragraph 2.2 of Resolution **46 (WARC-92)** shall also be applied to geostationary transmitting space stations with respect to terrestrial stations.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 3/B-LEO

Reason
To facilitate the introduction of mobile-satellite systems in this band while providing adequate protection of analog point-to-point and multipoint fixed systems in the band.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 4/SS

Proposal to Amend
Article 8 of the Radio Regulations

MOD 855A In the band 13.75-14.0 GHz, the e.i.r.p. of any emission from an earth station in the fixed-satellite service shall be at least 68 dBW, and should not exceed 85 dBW, with a minimum antenna diameter of 4.5 meters. In addition the e.i.r.p., averaged over one second, radiated by a station in the radiolocation and radionavigation services towards the geostationary orbit shall not exceed 59 dBW. . See Recommendation ITU-R S.1068.

MOD 855B In the band 13.75-14.0 GHz geostationary space stations in the space research service, for which information for advance publication has been received by the ITU-R prior to 31 January 1992, shall operate on an equal basis with stations in the fixed-satellite service; after that date new geostationary space stations in the space research service will operate on a secondary basis. Until 1 January 2000, stations in the fixed-satellite service shall not cause harmful interference to non-geostationary space stations in the space research and earth exploration-satellite services; after that date these non-geostationary space stations will operate on a secondary basis in relation to the fixed-satellite service. See Recommendations ITU-R S.1069 and ITU-R SA.1071.

Reasons:
Resolves 1 of Resolution 112 called for studies, with respect to the values given in No. 855A of the Radio Regulations relating to allocations in the band 13.75-14.0 GHz and to report the outcome at least one year before the next competent conference. ITU-R Task Group 4-4 was formed to perform the necessary studies. This Task Group completed its studies and confirmed the values given in No. 855A. Recommendation ITU-R S.1068 was developed with respect to the sharing of the fixed-satellite service with the radiolocation and radionavigation services.

Resolves 2 of Resolution 112 called for studies with respect to the technical compatibility between the primary allocation to the fixed-satellite service (Earth-to-space) and the secondary allocations to the space research and Earth exploration-satellite services. ITU-R Task group 7-3 was established to study this compatibility taking into account the time frames given in No. 855B. Task Group 7-3 developed protection criteria for the secondary services. Task Group 4-4 considered constraints which would apply to the fixed-satellite service to meet these protection criteria within the time frames given in No. 855B. The two Task Groups, in close consultation, developed two companion Recommendations: ITU-R S.1069 and ITU-R SA.1071. These Recommendations provide further technical details with respect to the compatibility between the fixed-satellite services and these secondary services.

PRELIMINARY FCC DRAFT PROPOSAL
Proposal No. 4/SS

Proposal to Amend
Resolution 112 of the Radio Regulations

SUP RESOLUTION No. 112 (WARC-92)

Reason:

Necessary studies called for in Resolution 112 have been conducted and recommendations have been approved. With modification to Nos. 855A and 855B Resolution 112 is no longer required.

APPENDIX 2

Industry Advisory Committee Recommended Candidate Bands for Additional Allocations for MSS below 1 GHz

Attachment C

MS 2
LOW EARTH ORBIT MSS BELOW 1 GHz
CANDIDATE BANDS FOR ADDITIONAL ALLOCATIONS[1]

12 December 1994

CANDIDATE FREQUENCY BAND (MHz)	EXISTING ALLOCATIONS AND USE			POTENTIAL LEO MSS ALLOCATION	POTENTIAL SHARING SCENARIOS	COMMENTS/NOTES
	U.S.		INTERNATIONAL			
	NON-GOVERNMENT	GOVERNMENT				
PRIORITY ONE CANDIDATES						
1215 400 MHz] 225 0 235 MHz (Space to Earth) and 380 399 MHz (Earth to Space) 312 315 MHz (Earth-to Space) and 387 390 MHz (Space to Earth)	None	Fixed (FN 627 Military Only) Mobile (FN 627 Military Only) Mobile Satellite (FN 6100 235 322 and 335-399.9, Military Only) These bands are heavily used throughout the U S. for critical military air traffic control and tactical training communications Specific functions of tactical training include air-ground air communications for combat weapons training carried out at and in the vicinity of all major air bases and military training areas in the U S Tactical and strategic military satellite communications, essential to linking the activities of ground, air, surface, and subsurface mobile platforms, are conducted in this band under 6100 Also, rocket test and test data telemetry operations are performed in this band	312-315 & 387-390 MHz Allocated Secondary to Non-GEO at WARC-92 (FN 641, Art 14) NATO Military Use Differs by Region/Freq. BROADCASTING (African countries only, 223-238 MHz) FIXED MOBILE AERONAUTICAL SPACE OPS RADIO ASTRONOMY	Uplink and Downlink	CDMA - Low output power spread over multiple MHz in one uplink and one downlink band with TDMA operation. Non-interference/no protection from existing services - Low PFD in downlink FDMA - Band segmentation - Dynamic channel avoidance	FCC Has Proposed Allocation of 5 MHz at 225 250 MHz and 20 MHz at 380 400 MHz. Dependent on NATO Agreement International 267 272 MHz Space Ops Space to Earth 272 275 MHz SPACE OPS Space to Earth 380 400 MHz possible ITBA for Europe (EPT (CEPT) planning 216 240 MHz for BAB after year 2005 Mobile Satellite service operating as secondary in 312 315 MHz and 387 390 MHz under Article 14 outside of U S (FN 641)
399 9 400 05 MHz (both directions)	RADIONAVIGATION SATELLITE Commercial shipping makes extensive use of TRANSIT-SAT signals for radionavigation	RADIONAVIGATION SATELLITE TRANSIT SAT (polar orbiting satellite) downlink transmissions in this band support worldwide navigation which expires 1 January 1997 Government use of the mobile satellite service is limited by US319 to earth stations operating with nongovernment satellites	Region - All RADIONAVIGATION SATELLITE	Uplink or downlink	FDMA and CDMA Dynamic Channel Avoidance Possible In Band Feeder Link	Allocated in U S as primary uplink in NVNG process beginning 1/1/97, included on WRC 95 preliminary agenda

138 144 MHz (138-141 Space to-Earth) (141-144 Earth to-Space)	None	FIXED MOBILE this band is the main frequency band for the Aeronautical Mobile (OR) Service, and any changes to the current use would have to be coordinated among the European countries and the U S.	Region 1 AERO. MOBILE (OR) SPACE RESEARCH 600, 601, 602, 604 Region 2 FIXED MOBILE /RADIOLOCATION/ SPACE RESEARCH (Space-to-Earth) Region 3 FIXED MOBILE SPACE RESEARCH (Space-to-Earth) 599, 605	Uplink and / or Downlink	FDMA and CDMA - Operation similar to Existing MMS Sharing - Dynamic Channel Avoidance - Low Output Power	U S footnote 630 (used 8 Mobile "generally" limited to military operations, similar to 148 0-149 9 MHz 599: In Australia, band is allocated to broadcasting until that service can be moved to regional broadcast bands 605: In China, band to allocated to radio location on primary basis
PRIORITY TWO CANDIDATES						
157 0375 174 MHz	MARITIME MOBILE (part) LAND MOBILE (part) (May be scheduled for narrow-band use only in 1995)	FIXED (part) MOBILE (part)	Region 1 FIXED MOBILE (except aeronautical mobile) Region 2 & 3 FIXED MOBILE	Space-to-ground direction	FDMA sharing similar to 137-138 MHz band: - Band segmentation CDMA sharing: - low pfd at ground	Wide band-width ideal for downlink for FDMA and CDMA systems - FDMA wide channel selection - CDMA wide bandwidth allows reduced pfd at ground 616 163 167 is Space Operation Service (S g) in China (Article 14) A15: 162 174 is broadcasting in Amreon A17: 167 174 is broadcasting in Afghanistan, China, Pakistan 618 170 174 is broadcasting in Japan
450-460 MHz	LAND MOBILE Space Research and Space Operations (FR664 450 MHz) Remote pickup broadcast 450-451, 455-456) Public safety, industrial, land transportation (451-454, 456-459).	Space Research and Space Operations (FR664 450 MHz) Veteran's me t programs depend upon the use of biomedical t ry and telecommunications in conjunction wi. nongovernment medical activities Some services considered public safety services this band being considered for rechannelization	Region - All FIXED MOBILE	Uplink and Downlink, including Potential for feed links	CDMA - Low Output Power - Low PFD in Downlink - Band Segmentation FDMA - Dynamic channel avoidance	Secondary allocation to Space Research Easy to share with FDMA and CDMA MSS systems Potential IIFRA band for Europe

470 512 MHz	BROADCASTING: - Chan. 14 to 20 LAND MOBILE (Public safety, industrial, land transportation, domestic public) Broadcasting plans to give up its analog channels and the change to HDTV may free spectrum	none	Regions 1,2,3 BROADCASTING (8 MHz channels for channels 21-34 Reg 1) Region 2 Fixed & Mobile Region 3 FIXED & MOBILE	Uplink and downlink, feederlinks	Sharing easily accomplished with fixed and mobile systems if reallocation of broadcasting spectrum occurs due to low use of UHF channels Possible long-term MMS MSS allocation	90 MHz for the MMS MSS service should be allocated on a world-wide basis
512 806 MHz (less 608 614 MHz)	BROADCASTING RADIO ASTRONOMY (608-614 MHz) Broadcasting plans to give up its analog channels and the change to HDTV may free spectrum	RADIO ASTRONOMY (608-614 MHz)	Region 1 BROADCASTING (Ch 21-36 & 55-69) FIXED Region 2 BROADCASTING RADIO ASTRON. Mobile Satellite (E-S) - 608-614 MHz Region 3 FIXED, MOBILE, BROADCASTING RADIOLOCATION	Uplink and downlink, feederlinks	Sharing easily accomplished with fixed and mobile systems if reallocation of broadcasting spectrum occurs due to low use of UHF channels Possible long-term MMS MSS allocation	90 MHz for the MMS MSS service should be allocated on a world-wide basis
LOWEST PRIORITY CANDIDATES						
806-824 MHz	LAND MOBILE Private land mobile (806-824) Domestic public land mobile (824-849, 869-894) Aeronautical public correspondence airphone (849-851, 894-896) General purpose mobile (901-902)	Some portion of this band is used for high-power U.S. Navy shipborne long-range search radars under footnotes US268 and G2. These radars serve a critical role in defense of the fleet, and are also used while in port	Region 2 FIXED MOBILE BROADCASTING	Space-to-Earth	FDMA and CDMA - Band Segmentation - Low Output Power	Need to Share With Naval Applications Without Interference Heavy use of SMR in band May be available for MMS MSS use, but is low priority due to heavy use and high powered systems

896-901 MHz (is portion of 890-902 MHz band)	LAND MOBILE (12.5 KHz channels paired with 935-941 MHz band)	Radiolocation (limited to military services)	Region 1 FIXED, MOBILE BROADCASTING Region 2 FIXED, MOBILE Region 3 FIXED, MOBILE BROADCASTING Radiolocation	Earth-to-space (in conjunction with 935-941 MHz band)	FDMA and CDMA sharing with private land mobile in the same bands - Band segmentation - Low output power - Dynamic channel avoidance	Growing use of private land mobile in the U.S.
932-935 MHz and 941-944 MHz	FIXED This band is paired with the 941-944 MHz band and channelized for point-to-point voice and data services. The 932-932.5 MHz end of the band is used for the single channel response from a remote location for point to multipoint multiple address services.	FIXED The 932-935 MHz and 941-944 MHz bands are shared by government and nongovernment fixed service users. It has recently been allocated for federal use. Use for low-capacity fixed systems is anticipated. Many federal agencies expect heavy government and nongovernment use for point-to-point and point-to-multipoint communications. functions include support for aviation activities, remote meter ready for electric power marketing and light route radio relay. The latter includes recommendation of light route systems from higher bands	REGION 2 FIXED MOBILE except aeronautical mobile Radiolocation	932-935 Uplink 941-944 Downlink Possible feeder links in Uplink	FDMA and CDMA - Dynamic Channel Avoidance - Low Output Power - Low PFD in Uplink - Geographic Separation - Band Segmentation	Fixed channelization offers Possible Use of Interstitial Spectrum in Both Directions Wide band spread spectrum with attendant low pfd's is practical use low priority for MMMS MSS use due to large number of applicants for use of band (60,000)
935-941 MHz	LAND MOBILE Private land mobile trunked and conventional systems in 12.5 KHz channels paired with 896-901 MHz	-Radiolocation limited to military services (G2) on a secondary basis to non-government LAND MOBILE operations (G2, US116, US215, US268)	REGION 2 FIXED MOBILE except aeronautical mobile Radiolocation	Uplink	FDMA and CDMA - Dynamic Channel Avoidance - Low Output Power - Low PFD in Uplink - Geographic Separation - Band Segmentation	Fixed channelization offers possible use of interstitial spectrum in both directions Wide band spread-spectrum with attendant low pfd's is practical use

APPENDIX 3

Comments Filed in Response to NOI in IC Docket No. 94-31:

1. Aeronautical Radio, Inc.
2. AirTouch Communications
3. American Mobile Satellite Corporation
4. American Radio Relay League
5. Association of American Railroads
6. Association for Maximum Service Television, Inc. & Other Major Television Broadcasting Entities
7. COMSAT Mobile Communications
8. COMSAT World Systems
9. Constellation Communications, Inc.
10. DBS Industries, Inc.
11. Ellipsat Corporation
12. GE American Communications, Inc.
13. George Jacobs & Associates & FCC International Broadcast Stations Licensees
14. Hughes Space and Communications Company & Hughes Communications Galaxy, Inc.
15. Intelligent Vehicle-Highway Society of America
16. Loral/Qualcomm Partnership, L.P
17. Motorola Satellite Communications, Inc. & Iridium, Inc.
18. National Association of Shortwave Broadcasters
19. Orbital Communications Corporation
20. STARSYS Global Positioning, Inc.
21. Teledesic Corporation
22. TRW, Inc.
23. United States Satellite Broadcasting Company, Inc.

Reply Comments to NOI in IC Docket No. 94-31:

1. Aerospace and Flight Test Radio Coordinating Council
2. American Mobile Satellite Corporation
3. American Radio Relay League
4. Association for Maximum Service Television, Inc.
5. AT&T Corp.
6. COMSAT Mobile Communications
7. COMSAT World Systems
8. CTA Incorporated
9. Ellipsat Corporation
10. GE American Communications, Inc.

Reply Comments to NOI in IC Docket No. 94-31 *continued*:

11. Hughes Space and Communications Company & Hughes Communications Galaxy, Inc.
12. Loral/QUALCOMM Partnership, L.P.
13. Motorola Satellite Communications, Inc. & Iridium, Inc.
14. National Association of Broadcasters
15. PanAmSat, L.P.
16. Primosphere Limited Partnership
17. Securicor Datatrak Limited
18. Teledesic Corporation
19. TRW, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 95-57

February 13, 1995

Released: February 17, 1995

Pyramid Communications, Inc.
c/o Eric L. Bernthal, Esquire
Latham & Watkins
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, D.C. 20004-2505

Dear Mr. Bernthal:

This is in reference to an unopposed request by Pyramid Communications, Inc. (Pyramid) for waiver of the Commission's one-to-a-market rule, 47 C.F.R. §73.3555(c), on behalf of Leonard Leiberman, a nominee to its board of directors. Mr. Leiberman currently sits on the board of directors of Outlet Communications, Inc. (Outlet).

Lieberman's dual positional interests would create a potential violation of the one-to-a-market rule in the Boston, Massachusetts market, where Pyramid, through a subsidiary, is the licensee of radio station WJMN(FM), Boston, and where Outlet, through a subsidiary, is the licensee of television station WJAR(TV), Providence, Rhode Island. Because the Grade A signal of WJAR(TV) encompasses the entire city of Boston,[1] the community of license of WJMN(FM), Lieberman's seat on the Pyramid board would be inconsistent with the one-to-a-market rule. That rule bars common ownership of television and radio stations in the same market, as well as interlocking directorates of such combinations. See 47 C.F.R. §73.3555, Note 2(h); Craig O. McCaw, 9 F.C.C. Rcd 5836, 5915 (1994).

[1] Pyramid is also the licensee of two other radio stations in the Boston market, WXKS-AM, Everett, Massachusetts, and WXKS-FM, Medford, Massachusetts. However, because the Grade A signal of station WJAR(TV) does not encompass entirely the cities of Everett and Medford, the one-to-a-market rule is not implicated as to those stations.

In Second Report and Order in MM Docket No. 87-7, 4 F.C.C. Rcd 1741, 1751, reconsidered in part, 4 F.C.C. Rcd 6489 (1989), the Commission concluded that it will "look favorably" upon, and will be "predisposed to grant," waiver requests involving radio and television station combinations in the top 25 markets, as defined by Arbitron Ratings Company, where at least 30 separately owned, operated and controlled broadcast licensees, or "voices," will remain after the proposed combination. In calculating the number of broadcast stations in a particular market, we include all commercial and noncommercial full-power television station licensees in the relevant area of dominant influence (ADI) television market and all operating AM and FM radio station licensees in the relevant television metropolitan market. Id. The number of "voices" in a given market is evaluated in accordance with the attribution provisions of our local ownership rules, in which persons have a "cognizable" interest in a broadcast station if they serve as an officer, director, partner, or owner of at least five percent of the voting stock of the licensee. Id.; see also id. at 1759 n.87.

In support of its waiver request, Pyramid asserts that Boston should be the relevant market in our analysis because the contour overlap between WJMN(FM)and WJAR(TV) exists in that market, not in the Providence market. Pyramid notes that Boston is the sixth largest television market and demonstrates, based upon the 1991-1993 Television ADI Market Guide, as reported in Broadcasting & Cable Yearbook 1994, that Boston has 15 television stations and 45 AM and FM radio stations. Of these 60 broadcast stations, Pyramid's exhibit indicates, at least 44 are separately owned, operated and controlled. Accordingly, Pyramid contends, its waiver request for the Boston market satisfies the "top 25 markets/30 voices" presumptive waiver standard set forth in Second Report and Order.

We agree that assessment of Pyramid's request must focus on the Boston market, which is entirely encompassed by WJAR(TV)'s Grade A contour.[2] Having reviewed the showing submitted by Pyramid, we find that Lieberman's seats on the boards of Pyramid and Outlet will not result in fewer than 30 separately owned, operated and controlled broadcast stations in Boston, the sixth largest television market. Thus, Pyramid has provided the necessary documentation to meet the "top 25 markets/30 voices" standard with regard to the

[2] While the two stations are located in separate ADIs, the one-to-a-market rule remains applicable here in that the Commission defines a radio and television station as belonging to "the same market" where the Grade A contour of the television station encompasses the entire community of license of the radio station. Second Report and Order, 4 F.C.C. Rcd at par. 5. Thus, for purposes of the rule, WJAR(TV), whose Grade A contour encompasses all of Boston, is deemed to be located in the same market as WJMN(FM).

WJAR(TV)-WJMN(FM) combination.[3] We conclude, therefore, that grant of the waiver permitting Mr. Lieberman to sit on the boards of both Pyramid and Outlet is in the public interest.

In view of the foregoing, IT IS ORDERED that the request for waiver of the Commission's one-to-a-market rule, 47 C.F.R. §73.3555(c), IS HEREBY GRANTED.

This letter was adopted by the Commission on February 13, 1995.

BY DIRECTION OF THE COMMISSION

William F. Caton
Acting Secretary

[3] We deny Pyramid's request that the waiver granted here serve as waiver of any and all one-to-a-market conflicts that may arise due to future broadcast acquisitions by either Pyramid or Outlet.

FCC 95-58

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	File No. 519WT0002
Commercial Realty St. Pete, Inc.	)	
	)	
Applications for Licenses in the Interactive Video and Data Services	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 15, 1995; **Released:** February 16, 1995

By the Commission:

I. INTRODUCTION

1. We find in this Notice of Apparent Liability for Forfeiture that Commercial Realty St. Pete, Inc. (Commercial Realty) violated Commission Rules and repeatedly abused the Commission's processes in connection with (i) the Commission's auctions of licenses in the Interactive Video and Data Services (IVDS),[1] and (ii) the investigation of Commercial Realty's conduct. Specifically, Commercial Realty communicated with other bidders in violation of our anti-collusion rules, falsely certified that it was financially qualified to fulfill its bidding obligations and falsely certified that it was entitled to designated entity status as a woman owned business. As a result of these violations, the Commission makes a finding of apparent liability for forfeiture in the amount of $390,000.

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[1] IVDS is a point-to-multipoint short distance communications service in which licensees may provide information, products, or services to individual subscribers located at fixed locations within a service area and subscribers may provide responses. The Commission's *Fourth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2330 (1994) established the rules and procedures for auctioning licenses in the IVDS.

2. Commercial Realty's applications will ultimately be dismissed with prejudice and Commercial Realty will also be subject to all applicable default penalties following reauction of the IVDS licenses.

3. In addition to this Notice of Apparent Liability for Forfeiture, in view of their apparent gross misconduct, the Commission will issue an Order to Show Cause why Commercial Realty and its principals should not be barred from participating in any future Commission auctions and why the same parties should not be prohibited from becoming Commission licensees.

II. BACKGROUND

4. On July 28 and 29, 1994, the Commission conducted auctions for 594 IVDS licenses in 279 markets across the nation. Winning bidders in the auctions were required, *inter alia*, to tender within five business days after the close of bidding down payments sufficient to bring their amount on deposit with the government up to 10 percent of each winning bid (or adjusted bid, if a bidding credit was claimed). Thus, down payments were due on or before August 8, 1994. *See, e.g.*, Public Notice "Notice and Filing Requirements for the First Auction of Interactive Video Data Service Licenses," Report No. ABC-94-02, released May 23, 1994. Commercial Realty submitted winning bids for IVDS licenses in 20 markets[2] for a total amount of $41,250,000, requiring a total down payment of at least $3,266,750.[3] It did not tender its down payment.[4]

5. After the conclusion of the IVDS auction, it came to the Commission's attention that the Commission's Rules and other IVDS auction requirements may have been violated by some of the participants. Therefore, by *Order, in GN Docket No. 94-96,* FCC 94-222

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[2] The markets in which Commercial Realty was the high bidder were Detroit-Ann Arbor, MI; St. Louis, MO; Miami, FL; Pittsburgh, PA; Baltimore, MD; Minneapolis-St. Paul, MN; Atlanta, GA; San Diego, CA; Denver-Boulder, CO; Seattle-Everett, WA; Milwaukee, WI; Tampa-St. Petersburg, FL; Kansas City, MO; Phoenix, AZ; Indianapolis, IN; Portland, OR; Sacramento, CA; Greensboro, NC; Charlotte, NC; and Raleigh-Durham, NC.

[3] Commercial Realty claimed designated entity status as a woman-owned business. This status would have made Commercial Realty eligible for a 25 percent discount from its actual winning bid amounts in all but the San Diego, Tampa-St. Petersburg, and Portland, OR markets, for which bidding credits were not available.

[4] At the end of each round of bidding, the two high bidders were required to sign a High Bid Acknowledgment Form. *See* Public Notice, *supra.* Subsequent to bidding, Commercial Realty and other high bidders filed requests for a waiver from the Commission that would permit them to delay the payment of their down payments. The requests were denied October 7, 1994. *See Order*, 9 FCC Rcd 6384 (Com. Car. Bur. 1994) (applications for review and petitions for reconsideration pending).

(released August 30, 1994) (*Order*), the Commission ordered an investigation of the conduct of the applicants in the IVDS auction to determine whether misconduct had occurred. One target of the investigation was Commercial Realty. Subpoenas, seeking testimony and documentation from Commercial Realty, James C. Hartley and Teresa Hartley, were issued, and all three parties refused to testify and to provide the Commission the information requested. The U.S. District Court for the District of Columbia subsequently granted the government's petition to enforce the subpoenas against the parties.[5] Consequently, Mr. and Mrs. Hartley, in compliance with the FCC's subpoenas, appeared in Washington, D.C. on January 18 and 19, 1995, and provided the testimony and most of the documentation.

6. Commercial Realty is a for-profit company incorporated in Florida on September 10, 1984. At that time, its sole director, President, and Registered Agent was James C. Hartley. On February 17, 1994, James C. Hartley's wife, Teresa Hartley purchased all of the outstanding shares of stock in Commercial Realty from a third party. She paid $500 for the stock. On April 15, 1994, Mrs. Hartley amended the corporation's bylaws to provide for a board of directors consisting solely of herself. On June 13, 1994, Commercial Realty authorized Mr. Hartley to enter into and execute FCC applications, contracts, and any other documents in connection with the acquisition of IVDS licenses on behalf of the corporation. Mr. Hartley was also authorized to acquire a 40 percent voting interest in, and become the sole director of, the corporation. On the same day, Mrs. Hartley was elected President, Treasurer, and Chief Executive Officer, and Mr. Hartley was elected Secretary, Executive Director, and Chief Operating Officer. Also on June 13, 1994, Mr. Hartley authorized Commercial Realty to accept a loan of $4,000,000 from Dean H. Tyler for the acquisition of IVDS licenses;[6] authorized Ralph E. Howe to bid on behalf of Commercial Realty at the IVDS auctions; and accepted an offer from Mrs. Hartley to loan Commercial Realty $60,000 to enable the corporation to participate in the IVDS auctions.[7]

7. On June 23, 1994, Commercial Realty filed with the Commission a FCC Form 175 (Application to Participate in an FCC Auction), wherein Commercial Realty, *inter alia*, certified that it was a woman-owned small business, and that it was legally, technically and financially qualified, and that it had not and would not enter into any undisclosed agreements

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[5] *See United States of America v. Commercial Realty St. Pete, Inc., et al., No. 94-345 (D.D.C. Dec. 21, 1994)*, appealed *sub nom. Commercial Realty St. Pete, Inc. v. U.S.*, No. 94-5391 (D.C. Cir. docketed Dec. 30, 1994).

[6] Mr. Tyler later admitted under a grant of testimonial and transactional immunity by the Department of Justice that he neither loaned, nor agreed to loan, $4,000,000 to Commercial Realty.

[7] In order to be eligible to bid at the auctions, each applicant was required to present a cashiers check in the amount of $2,500. High bidders were required to submit an upfront payment of $2,500 for every five licenses for which they were the high bidders immediately after the first license was won. *See Fourth Report and Order*, 9 FCC Rcd at 2334.

or understandings regarding the amount to be bid, bidding strategies, or the particular license on which it or other parties would or would not bid. Commercial Realty's FCC Form 175 also specified that it intended to bid for licenses in 277 markets,[8] and identified Ralph E. Howe as the person authorized to make or withdraw bids on behalf of the company. The certification was signed by Ralph E. Howe, who identified himself as a director of Commercial Realty.

8. In connection with Commercial Realty's decision to participate in the IVDS auctions, Mr. Hartley began gathering information about IVDS. He conducted research at the University of South Florida's library; acquired information from two IVDS equipment manufacturers, EON Corporation (EON)[9] and Interactive Return Service; attended the Commission's pre-auction seminar on June 6, 1994; received information directly from the Commission, including a "Bidder's Information Package;" and watched a video tape concerning IVDS, which was produced for the Commission. Mr. and Mrs. Hartley and Mr. Howe (all of whom reside in Florida) came to Washington, D.C., in order to participate in the IVDS auctions.

9. Although Mr. Howe was specified in Commercial Realty's FCC Form 175 as the person authorized to make bids on behalf of the corporation, he decided to forego this responsibility. Richard Kent, II later agreed to assist Mr. Hartley with the bidding. Mr. Kent thereafter sought and obtained, from Commission officials, authority to bid on behalf of Commercial Realty.

10. On Thursday, July 28, 1994, Mr. Hartley, with Mrs. Hartley's and Mr. Kent's assistance, submitted winning bids totalling $41,250,000 for IVDS licenses in 20 of the markets put up for auction. Sometime during the next two days, Mr. Hartley made at least one unsuccessful attempt to visit EON's offices in nearby Reston, Virginia.

11. Within the next few days, Mr. Hartley began expressing second thoughts about his involvement in IVDS. Mr. Hartley apparently was concerned that EON, which was the only manufacturer of IVDS equipment that had been "type accepted" by the Commission, would not be able to supply equipment to licensees early enough to enable the licensees to meet the Commission's build-out requirements.[10] On July 30, 1994, he had a discussion with

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[8] Although Commercial Realty indicated that it intended to bid for 277 markets, it was only required to make "up front" payments for the 20 markets for which it submitted winning bids.

[9] Because EON has an interest in companies that were to participate in the auctions and thus wanted to avoid the potential for collusion with other would-be bidders, its representatives refused to provide Hartley any information concerning the state of its IVDS equipment and its availability for purchase. They also refused to provide him with any information about the relative value of an IVDS license in a particular market.

[10] *See Report and Order*, 7 FCC Rcd 1630 (1992).

Christopher Pedersen, a principal of Interactive America, which had also submitted winning bids for a number of IVDS licenses. Mr. Pedersen told Commission investigators that Mr. Hartley conveyed to him doubts about EON's reliability.

12. By Monday, August 1, 1994, Mr. Hartley was discussing with counsel the possibility of formally requesting the Commission to delay the August 8, 1994 down payment deadline. Also on August 1, Mr. Hartley told his IVDS consultant, Steven J. Schupak, who was a former Development Product Manager at EON, that rather than risk losing a substantially larger down payment by failing to meet the Commission's construction requirements and having the Commission cancel Commercial Realty's licenses, he would forfeit his upfront deposit.

13. The next day, August 2, 1994, Mr. Hartley met for six hours with Fernando Morales, the Chief Executive Officer of Interactive Return Service, which has also developed IVDS equipment. Mr. Morales said that during the meeting Mr. Hartley expressed to him the belief that the Commission's build-out requirements were unfair and that he risked losing his entire investment if he made the down payment. According to Mr. Morales, Mr. Hartley pressed Mr. Morales for assurances prior to making his down payments that his investment in IVDS would be successful, but Mr. Morales said that he could not give such assurances.

14. Leaving Mr. Morales, Mr. Hartley went directly to a meeting and product demonstration with executives at EON. At this meeting Mr. Hartley displayed no interest in the consumer applications of IVDS or in the cost of constructing an IVDS system. Instead, he insisted on highlighting perceived deficiencies in EON's technology and he solicited EON's support in seeking a postponement in the down payment deadline. Later that day Mr. Hartley spoke over the telephone with Christopher Pedersen, the principal of Interactive America. The two men discussed the perceived inability of winning bidders to timely construct IVDS systems and Mr. Hartley suggested that Commercial Realty and Interactive America overbid for their licenses.

15. On August 3, 1994, Mr. Hartley, who by this time apparently had decided to have Commercial Realty default on its down payments,[11] transmitted by facsimile a letter to all of the other winning bidders urging them to join with him in petitioning the Commission to delay the down payment deadline. In the letter, Mr. Hartley advised his fellow auction winners that investigations had led Commercial Realty to conclude that reliable technology was not yet available to enable the construction of IVDS facilities, nor would the situation change for some time. He therefore surmised that a delay in the down payment deadline would prompt the Commission to approve additional vendors' IVDS technology so that the new licensees would have sources other than EON for their equipment. He also expressed the

[11] In a memorandum dated August 3, 1994, to James C. Hartley from William J. Franklin, his communications counsel, Franklin noted that "you have decided not to file any deposits, and have instructed me to file a deferral petition."

need for prompt group action, and asked auction winners to send letters of support to his communications counsel, William J. Franklin, and to direct any questions they might have to Schupak. He added, that both would be "more than happy to coordinate all of your efforts." [12] Mr. Hartley further advised his fellow auction winners that they should, either by telephone, facsimile, or overnight courier, seek Congress' assistance in pressing the FCC to delay the down payment deadline. Finally, Mr. Hartley sent an accompanying form letter pleading for delay that the recipients of his letter could use to contact Mr. Franklin and Members of Congress.

16. The impact of Mr. Hartley's call-to-action letter was immediate. Two winning bidders informed the Commission that the letter and its attendant publicity had caused investors who had previously committed venture capital to withdraw their commitments. Because of what happened to these auction winners, numerous informal inquiries about delaying the down payment deadline, and widespread press reports about Mr. Hartley's letter, the Commission, on August 5, 1994, issued a Public Notice entitled "IVDS Bidder Alert". The Public Notice stated unequivocally that the deadline would not be altered and warned that bidders who failed to submit their down payments by the deadline would be considered in default and their licenses would be reauctioned. It also stated that efforts to encourage other winning bidders to default would constitute an abuse of the Commission's processes and might violate antitrust or other federal laws as well. *See* Public Notice, "IVDS Bidder Alert," released August 5, 1994. The Commission sent the "IVDS Bidder Alert" via overnight delivery to each IVDS winning bidder.

17. On August 5, 1994, Mr. Hartley's agent prepared and delivered to major news organizations across the nation a press release making Commercial Realty's arguments regarding IVDS, the availability of equipment, the Commission's build-out schedule, and down payment requirements. The press release stated that Mr. Hartley had decided not to submit Commercial Realty's down payment pending a formal appeal to the FCC.

18. On August 8, 1994, Commercial Realty defaulted on its obligation to make the required down payment.

III. DISCUSSION

Anti-collusion Rule Violations

19. The *Second Report and Order* established special rules to prohibit potential

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[12] Neither Mr. Franklin nor Mr. Schupak had any prior knowledge of the letter. Nor had either given his consent to have his name appear as Mr. Hartley's contact person. As a result, Mr. Franklin, who had counseled Mr. Hartley to timely honor Commercial Realty's down payment obligation, resigned as Commercial Realty's communication counsel the next day. Mr. Schupak resigned as Commercial Realty's consultant four days later.

collusive conduct in competitive bidding. *See* 47 C.F.R. § 1.2105(a)(2)(viii), (a)(2)(ix), (c). The rules require disclosure of all agreements, arrangements or understandings with any parties which relate to the competitive bidding process, prohibit all bidders, from the time they file their applications to participate in the auction process until after the high bidder makes the required down payment, from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders.

20. Mr. Hartley apparently engaged in prohibited discussions, or other communications, with other bidders on several occasions before the down payments were due. Moreover, the purpose of these discussions and communications can reasonably be assumed to have been to discourage other bidders from making down payments by suggesting that winning bidders overpaid for their licenses and arguing that they would risk substantial financial loss if they continued to pursue IVDS licenses by timely tendering down payments. The first occasion occurred on July 30, when Mr. Hartley and Christopher Pedersen met at the Omni Shoreham Hotel in Washington, D.C. and the two discussed misgivings that Mr. Hartley had with EON's IVDS technology. The second occurred on August 2, 1994, when Mr. Pedersen and Mr. Hartley discussed over the telephone the perceived inability of winning bidders to timely construct IVDS systems and concluded that Commercial Realty and Interactive America had overbid for their licenses. Based on these facts, we find that Mr. Hartley's two discussions with Pedersen constituted two separate flagrant violations of the anti-collusion rules, warranting maximum forfeitures of $10,000 for each violation. Consequently, we assess a $20,000 forfeiture for Commercial Realty's violations of Section 1.2105(c) of the Commission's Rules.

Abuse of the Commission's Processes

21. *Financial qualification:* The *Second Report and Order* specified that applicants for the IVDS auctions would be required to complete FCC Form 175, including a certification that the applicant is legally, technically, financially and otherwise qualified to acquire a radio license. 9 FCC Rcd 2357, 2376.

22. On June 23, 1994, Commercial Realty certified that it was financially qualified to become an IVDS licensee. Commercial Realty's almost total absence of assets transforms its proffered certification into a willful misrepresentation constituting an abuse of the Commission's processes.[13] The only financial asset that Commercial Realty appears to have held at the time it filed its FCC Form 175 was $60,000 that Mrs. Hartley had loaned the

[13] Abuse of process is a broad concept that includes use of a Commission process to achieve a result that the process was not intended to achieve or use that process to subvert the purpose the process was intended to achieve. *See Broadcast Renewal Applicants,* 3 FCC Rcd 5179, 5199 n.2 (1988).

corporation in order to enable it to submit bids for licenses in 277 markets.[14] Mr. Hartley claims to have relied on an alleged promise from Dean H. Tyler to loan Mr. Hartley $4,000,000 in cash in order to enable him to fulfill Commercial Realty's down payment obligations.[15] Mr. Hartley has testified, however, that Mr. Tyler's commitment was never committed to writing. Moreover, Mr. Hartley was unable to provide any specifics regarding the terms of the loan other than (i) the interest rate was to be fifteen percent, and (ii) that neither Mr. Hartley nor Commercial Realty were required to furnish any collateral to secure the loan or even provide Mr. Tyler with a business plan.[16] Mr. Hartley testified that he neither asked for nor was provided with any assurances that Mr. Tyler had set aside $4,000,000 for the loan or even if he had the available assets to do so. In fact, Mr. Hartley testified that he was not sure when or where Mr. Tyler made his promise to loan the $4,000,000. According to his testimony, all that Mr. Hartley remembers was that he had told Mr. Tyler that IVDS was a no lose opportunity to make a good deal of money and that he would guarantee Mr. Tyler a fifteen percent return on his investment if Mr. Tyler would be willing to provide Mr. Hartley with $4,000,000 in cash for the down payment on the $40,000,000 that Mr. Hartley intended to spend at the IVDS auctions, and that Mr. Tyler's response was "let's do it" or words to that effect. It was upon these facts, that Mr. Hartley committed Commercial Realty to incurring financial obligations exceeding $40,000,000. In addition, no arrangements were made, or even seriously considered, regarding how

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[14] Although Mrs. Hartley claims she was the sole lender, she and Mr. Hartley have testified that the $60,000 was drawn from a personal bank account that Mr. and Mrs. Hartley jointly control.

[15] On September 2, 1994, Commercial Realty filed with the Commission a Petition for Partial Reconsideration. The petition sought to expand the scope of the investigation instituted by the August 30, 1994 *Order*. Commercial Realty attached to its petition a declaration of Mr. Tyler, executed under penalty of perjury, stating that he had agreed prior to the auctions to loan Commercial Realty $4,000,000 for its acquisition of IVDS licenses and that the money was available to him through banks and through other investors. Mr. Tyler subsequently testified, however, that his declaration was entirely false and misleading. Testifying under a Department of Justice grant of immunity from prosecution, Mr. Tyler said that he never made any loan commitment before the auctions to either Mr. Hartley or Commercial Realty and that he did not have the $4,000,000 to make any such commitment. He said that he proffered the declaration solely as a favor to Mr. Hartley because Mr. Hartley told him that the technology for IVDS did not work and, thus, Mr. Tyler would never have to provide the money promised. Moreover, Mr. Tyler testified that the document was drafted after the auctions. According to Mr. Tyler, Mr. Hartley drafted the document and included the $4,000,000 figure because that sum constituted Commercial Realty's 10 percent down payment obligation. Because Mr. Hartley's testimony disputes Mr. Tyler's rendition of what transpired, this matter will be the subject of the Show Cause proceeding that we intend to initiate.

[16] Mr. Hartley has failed to demonstrate that a document summarizing Commercial Realty's business plans was ever drafted.

Commercial Realty would raise the money needed to honor its spectrum purchase and build-out obligations. Given these facts, Commercial Realty was not ever financially able to submit the minimum down payment amounts for IVDS licenses in the 20 markets for which it submitted winning bids. Moreover, the deception was continued after Commercial Realty completed its bidding. Richard Kent, Commercial Realty's director, on each of Commercial Realty's High Bid Acknowledgment Forms (FCC Form 178), in addition to confirming the amount of each of Commercial Realty's winning bids, confirmed that Commercial Realty had thoroughly reviewed and was willing to be bound by all of the Commission's auction requirements, which includes that the bidder have the available resources to honor the financial obligations it has incurred. As before, this certification was completely baseless. Accordingly, the submission of Commercial Realty's bids, which had no financial backing, constituted multiple violations of Section 1.17 of the Commission's Rules, as well as a flagrant abuse of the Commission's processes, warranting the maximum forfeiture. A forfeiture of $10,000 per market times the 20 markets that it won at auction for a total forfeiture of $200,000 is therefore assessed.

23. *Designated entity:* The Commission, in the *Second Report and Order, supra.*, established the eligibility criteria and general rules governing the award of bidding preferences in Commission auctions for designated entities. Designated entities are small businesses, businesses owned by members of minority groups and/or women, as defined in 47 C.F.R. §§ 1.2110(b) and 95.816(d). In order for a corporation to claim a preference as a designated entity, at least 50.1 percent of the corporation's stock must be held by minority or female principals and the applicants must be prepared to demonstrate that actual, *de facto*, control truly resides with the minority or female principal. *Second Report and Order* at 2396-97.

24. On its June 23, 1994 application and at the July 28, 1994 auction, Commercial Realty claimed designated entity preference as a woman-owned business on the basis that Teresa Hartley held 60 percent equity interest in the corporation and was also its President, Treasurer, and Chief Executive Officer. The testimony with the facts adduced during the investigation unequivocally show that actual, *de facto* control resided with Mr. Hartley, however. Mr. and Mrs. Hartley each testified that the only active role that Mrs. Hartley played in Commercial Realty's affairs was to sign the corporation's checks. Mr. Hartley, without first consulting with Mrs. Hartley, or obtaining her specific authorization, *inter alia*, authorized the corporation to accept a purported loan of $4,000,000 for the purchase of IVDS licenses; hired Ralph E. Howe to represent Commercial Realty at the IVDS auctions; authorized all of Commercial Realty's bids, which totalled $41,250,000; decided when Commercial Realty would cease bidding; hired Steven J. Schupak as Commercial Realty's IVDS consultant; and retained William J. Franklin as Commercial Realty's communication counsel. Moreover, all of the actions taken in the name of Commercial Realty to have the down payment deadline postponed were orchestrated singularly by Mr. Hartley, and it was he who made the decision to have Commercial Realty default on its down payments. Finally, Mr. and Mrs. Hartley each testified that Commercial Realty had no other function than to acquire IVDS licenses. The research into the viability of IVDS on behalf of the

corporation was conducted solely by Mr. Hartley. In view of these facts, we find that Commercial Realty willfully abused the Commission's processes and the Commission's designated entity eligibility rules, 47 C.F.R. §§ 1.2110(b), 95.816(d), by improperly claiming bidding credits as a women-owned business on each of the 17 times it claimed the credits. A forfeiture of $10,000 is therefore assessed for each time Commercial Realty improperly claimed to be a woman-owned business for a total forfeiture of $170,000.

IV. CONCLUSIONS

25. We find that Commercial Realty has violated the Commission's Rules and repeatedly and deliberately abused the Commission's processes. Pursuant to Sections 503(b)(1)(B) and (2)(B) of the Act, a total forfeiture of $390,000 is therefore assessed against Commercial Realty. In addition, Commercial Realty, will be held liable for a substantial default penalty, which will be assessed following the reauction of the defaulted IVDS licenses.[17]

V. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. §503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Commercial Realty St. Pete, Inc. IS HEREBY NOTIFIED of an APPARENT LIABILITY FOR FORFEITURE in the amount of three hundred ninety thousand dollars ($390,000) for willful and repeated violations of the Sections 1.17 and 1.2105(c) of the Commission's Rules, 47 C.F.R. §§ 1.17 and 1.2105(c), and willful and repeated abuses of the Commission's processes.

27. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that Commercial Realty St. Pete, Inc. SHALL PAY within thirty (30) days of the release date of this Notice the full amount specified above in the manner provided for in Section 1.80(h) of the Rules[18] or SHALL FILE a response showing why a forfeiture should not be imposed or should be reduced.

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[17] Pursuant to Section 1.2104(g)(2) of the Commission's Rules, the default penalty will be based on the difference between the amount of the defaulted bid and the amount the government receives when the license is reauctioned plus an additional 3 percent of the defaulted bid amount or the subsequent winning bid amount, whichever is less. In any case, even if the subsequent winning bids are higher than Commercial Realty's defaulted bids, the minimum default penalty will be $1,237,500 (3% of Commercial Realty's defaulted bids).

[18] Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission to Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the File Number of the above captioned proceeding.

28. **IT IS FURTHER ORDERED**, that the Secretary shall sent a copy of this Notice to Commercial Realty St. Pete, Inc. by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 95-64
Washington, D.C.

In the Matter of	)	
	)	CC Docket No. 94 - 120
AT&T Communications	)	
Tariff F.C.C. Nos. 9 and 11	)	Transmittal No. 6788

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 1995 ; Released: February 24, 1995

By the Commission:

I. INTRODUCTION

1. On April 15, 1994, AT&T Communications (AT&T) filed Transmittal No. 6788 to offer Feature Group A and B Connection Service.[1] In an Order released August 12, 1994, the Common Carrier Bureau suspended Transmittal 6788 for five months and initiated an investigation of the reasonableness of the offering under Section 201(b) of the Communications Act of 1934, as amended (Act).[2] In this Order we terminate that investigation, and find Transmittal 6788 unlawful for the reasons stated below. We also conclude that, if AT&T chooses to refile a tariff offering its Feature Group A and B Connection Service, it should incorporate the modifications described below. In general, those modifications involve: adding specific and clear ordering and cancellation procedures for the service; offering the Access Coordination Function independently of the Feature Group Connection Service; offering for resale the entrance facilities independently of the direct trunked transport facilities; clarifying application of nonrecurring charges for the service; and amending its tariff to collect charges from exchange carriers using facilities leased to AT&T that the LECs continue to use in their own provision of Feature Group A and B Service to the LECs' customers of that service.

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[1] Transmittal 6788 would amend AT&T's private line Tariff F.C.C. Nos. 9 and 11 to introduce "Feature Group A (FGA) and Feature Group B (FGB) Connections which provide the physical connection between a Local Exchange Company End Office Switch and the AT&T Central Office, for connection to AT&T Private Line Services." AT&T proposes to apply a single FGA (or FGB) charge to each FGA (or FGB) service it connects.

[2] AT&T Communications Tariff F.C.C. Nos. 9 and 11, Transmittal No. 6788, 9 FCC Rcd 4480 (Com. Car. Bur. 1994) (Suspension Order). Section 201(b) of the Communications Act of 1934, 47 U.S.C. § 201(b), requires all practices in connection with interstate communications by wire to be just and reasonable.

II. BACKGROUND

A. LEC Switched Access Feature Groups A and B Service

2. Immediately following divestiture and implementation of the Commission's access charge rules,[3] the LECs' interstate access tariffs offered three types of switched access service, known as Feature Groups. Feature Groups A and B are local exchange services that were used to provide interstate access service to interexchange carriers (IXCs) other than AT&T prior to the widespread availability of equal access. The technical and performance characteristics of Feature Groups A and B differ significantly from those of Feature Group C. One important difference is that end users must dial a seven digit local exchange number in order to obtain access to their preferred long distance carrier. The importance of Feature Groups A and B to the interexchange industry declined considerably with the nationwide availability of Feature Group D, the "equal access" service arrangement. Feature Group D equal access enables end users to obtain access to their presubscribed interexchange carrier by dialing "1+". Nonetheless, Feature Groups A and B continue to be the primary switched access service offerings for IXCs other than AT&T in end offices not converted to equal access. However, these services are also used by non-carrier customers, as discussed below.

3. Feature Group A access[4] provides a customer[5] with dedicated transmission facilities

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[3] See MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983), mod'd on recon., 97 FCC 2d 682 (1983), mod'd on further recon., 97 FCC 2d 834 (1984), aff'd in principal part and remanded in part, National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), 101 FCC 2d 1222 (1985), aff'd on further recon., 102 FCC 2d 849 (1985).

[4] For ease of discussion, we will refer primarily to Feature Group A service in this portion of the text, although the same principles apply to Feature Group B service. Feature Group A and Feature Group B differ in the following ways: Feature Group A service uses a line-side connection at the LEC's end office, meaning those calls are not processed through that end-office switch. Feature Group A uses local numbers which differ by LEC calling area. Feature Group B service, on the other hand, is a trunk-side connection at the LEC's end office, but calls are processed through a uniquely designated end office called a dial tone office due to difficulty in separating local traffic from access traffic. Because Feature Group B is a trunk-side connection, Feature Group B offers greater functionality and is more useful for IXC services.

[5] As discussed in more detail below, the "customer" ordering Feature Group A access is not necessarily an IXC. A non-carrier entity may order Feature Group A access from a LEC--either directly or using an IXC as its ordering agent -- to be used in conjunction with interexchange service ordered from an IXC. We use the term "customer" throughout this Order to refer to non-carrier entities and smaller IXCs that subscribe to Feature Group A service. The terms "end user" and "end user customer" refer to the customer of an IXC who uses Feature

from an IXC's Point of Presence (POP) to a LEC central office, called the dial tone office. End users located within the LEC's service area[6] obtain access to the Feature Group A customer's interexchange service by dialing a seven-digit local number that is assigned to the Feature Group A customer in the dial tone office. In some situations, traffic may be routed through a LEC end office serving the IXC POP (serving wire center), which is located between the IXC's POP and the dial tone office. Traffic is then switched from the dial tone office to the LEC end office which furnishes the line to the customer's premises.

4. Two types of customers have been the primary subscribers to Feature Group A access. First, smaller IXCs have relied upon it to provide interstate switched toll service at end offices where neither Feature Group D equal access nor Feature Group B is available. Within LATAs in which such an IXC takes Feature Group A, a caller dials the Feature Group A seven digit number to reach the IXC's POP and then dials an authorization code and the ten digit number the customer wishes to call. The caller must pay any local toll or message unit charges incurred to reach the IXC's POP in addition to the IXC's toll charges because interstate Feature Group A calls cannot be distinguished from local calls placed to the dial tone office. Generally, when the LEC terminates the call through a Feature Group A access arrangement, however, it will carry the call anywhere within the receiving service area without assessing any additional toll charges or local message unit charges, even if the called party is located outside of the local service area of the IXC's Feature Group A dial tone office.

5. Feature Group A is also used by non-carrier entities as part of an interstate Foreign Exchange (FX) or Off Network Access Line (ONAL) arrangement. In this configuration, the Feature Group A customer obtains from the LEC a combination of local exchange service and dedicated interoffice transport facilities linking the LEC dial tone office with an IXC POP. The IXC POP is linked to the out-of-state Feature Group A customer by an interstate private line. This service configuration enables end users in the area served by the dial tone office to reach the out-of-state Feature Group A customer without incurring interstate toll charges. The dial tone office processes the call originating in its service area as a local call and delivers it to the dedicated trunked transport and ultimately the IXC's interstate private line for transmission to the Feature Group A customer. For example, a customer located in Newark, New Jersey may subscribe to Feature Group A FX service in New York City by obtaining a seven digit local number in a New York City end office. A caller in New York City would be able to dial that seven digit access code to reach the Feature Group A customer's location in Newark without incurring toll charges. Feature Group B is frequently used by callers to connect to enhanced service provider offerings in lieu of 800 number access because the Feature Group B number is the same nationwide.

— Group A service to get access to the IXC's interexchange service.

[6] In the case of the former Bell Operating Companies, these service areas are called Local Access and Transport Areas, or LATAs.

6. Prior to the Commission's 1993 restructuring of local transport rates,[7] transport costs for Feature Groups A and B were recovered through usage-based charges, pursuant to the "equal charge per minute of use" requirement of the Modification of Final Judgment (MFJ).[8] This approach essentially required all interstate access service customers to pay averaged rates. The actual type of facilities -- voice grade, DS1 or DS3 -- that was used to transport a customer's traffic between the IXC's POP and the LEC serving wire center did not affect the charges that were assessed to Feature Groups A and B customers under the equal charge rule. Rather, the rates were generally usage-sensitive and distance sensitive.[9]

B. The Local Transport Rate Restructure

7. Under the terms of the MFJ, the equal charge rule expired on September 1, 1991. The Commission required LECs to maintain the equal charge rate structure thereafter, pending further agency action. In the local transport rate restructure proceeding, the Commission replaced the equal charge rule with a new system of interim rate elements designed to reflect more closely the manner in which the costs of providing transport services are incurred.[10] The interim local transport rate structure established in the Transport Order consists of four unbundled rate elements: entrance facilities; direct trunked transport; tandem switched transport; and the interconnection charge. Flat-rated charges apply to the entrance facilities and direct

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[7] Transport Rate Structure and Pricing, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992) (Transport Order); recon., 8 FCC Rcd 5370 (1993) (First Reconsideration Order); further recon., 8 FCC Rcd 6233 (1993); further recon., FCC No. 94-325, rel. Dec. 22, 1994 (collectively, Transport Restructure Orders).

[8] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983). The "equal charge per minute of use" rule required that charges for delivery or receipt of traffic of the same type between end offices and facilities of IXCs within an exchange area to be equal, per unit of traffic delivered or received, for all interexchange carriers. See App. B at para. B(3).

[9] Transport charges for terminating Feature Group A access service were usually based on the Feature Group A customer's usage and the distance between the serving wire center of the IXC POP and the end office serving the called party. Transport charges for originating Feature Group A access service were also based on the Feature Group A customer's usage, and the distance between the serving wire center to which the IXC's POP was linked and the Feature Group A customer's dial tone office, not the end office serving the calling party. This difference arose because most LEC switches at the end office were unable to differentiate between an originating Feature Group A call and a local call. Hence, originating Feature Group A access charges were assessed as though the call originated from an end user served by the dial tone office.

[10] See Transport Rate Structure and Pricing, CC Docket No. 91-213, 6 FCC Rcd 5341 (1991).

trunked transport, while usage-sensitive charges apply to tandem switched transport. The interconnection charge is usage sensitive and is paid by all customers of interstate switched access service, even those that do not subscribe to LEC switched transport service.[11]

8. In the First Reconsideration Order, the Commission specifically addressed application of the transport rate restructure to Feature Group A access service.[12] The Commission directed the LECs to apply the flat-rated entrance facility element for transport service between the IXC POP and the LEC end office serving the IXC POP (serving wire center) for both originating and terminating Feature Group A traffic. If the LEC serving wire center is not the Feature Group A dial tone office, the flat-rated direct trunked transport charge applies to transport between the serving wire center and the dial tone office where the call terminates. Usage-sensitive tandem switched transport rates, excluding the tandem charge, apply to transport between the dial tone office and the end office where the call terminates. The Commission did not specifically direct LECs to bill any particular customer class, i.e., IXCs or end users, for these rate elements.[13]

C. The Impact of the Rate Restructure on LEC Feature Groups A and B Billing

9. Feature Groups A and B customers generally need analog voice grade transmission service to deliver their traffic from the dial tone office to the IXC POP. AT&T's tariffs, however, typically require its customers to deliver traffic to its POPs via digital high capacity facilities.[14] This requirement means that Feature Group A traffic must be delivered over a DS1 or higher capacity facility. Since a DS1 facility is usually the equivalent of 24 voice grade channels, it is capable of carrying far greater volumes of traffic than the typical Feature Group A or B customer requires. In order to satisfy AT&T's interface requirement, LECs usually aggregate traffic from several different Feature Groups A and B customers on high capacity facilities to transport traffic to the AT&T POP. As noted above, before transport rates were restructured, Feature Group A customers paid uniform charges per unit of traffic, regardless of specific transmission service that the LEC actually used to carry traffic between the IXC POP and the LEC wire center serving the POP. After the rate restructuring, the LECs assess different entrance facility and direct trunked transport charges based on the type of transmission service used (e.g. voice grade, DS1 or DS3).

10. The Transport Restructure Orders do not require LECs to bill Feature Group A end user customers directly for their pro rata share of the charges for high capacity entrance facilities

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[11] Transport Order, 7 FCC Rcd at 7009-10.

[12] First Reconsideration Order, 8 FCC Rcd at 5372-73.

[13] Id.

[14] See AT&T Tariff F.C.C No. 10, § 100. Tariff 10 provides mileage and administrative requirements concerning the operation of AT&T's offices. See also AT&T Direct Case at 7 (stating that AT&T requires traffic to be delivered at a DS1 level at a minimum).

and direct trunked transport facilities. These facilities are used to carry traffic between AT&T's POPs and the LEC serving wire centers and between the serving wire centers and the Feature Group A dial tone offices, respectively.[15] If a LEC elects to use this pro rata approach, it would recover from a Feature Group A customer a portion of the total entrance facility charge for the transmission service used to carry the customer's traffic based on the customer's relative share of the capacity of the facility that is actually used for transport service. Under this approach, the LEC would assume the risk of underutilization of the transmission facility. Most LECs, however, do not offer this billing option. Instead, they require a single customer to be responsible for paying the charges for entrance facilities and direct trunked transport service. These LECs thus generally bill AT&T for the entire charge for the high capacity entrance facilities used to deliver Feature Group A traffic to AT&T's POP, based on the rationale that AT&T has imposed the requirement that traffic be delivered via a DS1 or other high capacity digital facilities. Under this approach, AT&T bears the risk of underutilization, since it is required to pay the entrance facility charges regardless of the amount of capacity of the facility that is actually in use.

11. AT&T initially raised this billing problem during the Bureau's review of the transport restructure tariffs.[16] AT&T argued that the LECs' proposal to charge the high capacity entrance facilities rates to a single customer was not required by the Transport Orders. In the Transport Tariffs Order,[17] the Bureau stated that split billing by the LECs is crucial for customers to obtain maximum benefits from the restructured transport rates.[18] The Bureau directed the LECs to refer the split billing issue, particularly as it affected Feature Group A service, to the industry's Ordering and Billing Forum for resolution and to report back to the Bureau on their progress in resolving the "split billing issue." The Bureau stated at that time that if those discussions did not produce substantial progress toward a mutually acceptable solution, the Commission might consider prescribing a method for providing split billing.[19]

12. Since the transport restructure tariffs took effect in December, 1993, the LECs have continued billing end user customers for the usage-rated transport elements of Feature Group A

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[15] See Transport Restructure Orders.

[16] See AT&T Petition filed in local transport restructure tariff review, November 15, 1993.

[17] In the Matter of Local Exchange Carrier Switched Local Transport Restructure Tariffs, 9 FCC Rcd 400 (Com. Car. Bur. 1993)(Transport Tariffs Order).

[18] Id. at 426. Under "split billing" LECs might, for example, bill an end user customer for its use of a high capacity facility by dividing total flat charges for the entrance facility among all of the end users whose traffic is carried over the facility.

[19] Id. at 427.

and B.[20] Many LECs, however, have not offered to split the charges for the use of the flat-rated entrance facilities among these customers. Rather, they are now billing AT&T for the entire entrance facility and, in some cases, the direct-trunked transport rate elements for Feature Group A and B service under their transport restructure tariffs. The LECs contend that AT&T is the ordering customer for the entrance facilities -- and, where appropriate, for the direct trunked transport element -- used to connect LEC facilities to AT&T's POPs because AT&T has specified that these facilities must be high capacity.[21] Moreover, the LECs claim that because those high capacity facilities are dedicated to AT&T's use, AT&T, as the cost causer, should be responsible for payment.

13. At least two LECs, Southwestern and NYNEX, have developed and now offer interim billing options for transport.[22] Southwestern's tariffed "Interim Split Billing Option," for example, credits the bills of "primary customers" to whom it charges an entire entrance facility based on the number of "secondary customers" sharing the facility. For every "secondary customer" the primary customer identifies, the LEC gives the primary customer a credit equal to 1/24th of the monthly DS1 charges normally billed. Thus, if AT&T advised Southwestern that 21 parties were sharing the use of an AT&T DS1 entrance facility, Southwestern would credit AT&T's bill for 21/24ths of AT&T's normal monthly DS1 charge. AT&T would pay Southwestern only the remainder, or 3/24ths, of the entire billed amount. The remaining 21/24ths of the monthly charges would be billed to the various secondary customers. NYNEX's tariffed "Shared Billing Arrangement" allows individual customers to order lower

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[20] See, e.g., Letter from Joseph J. Mulieri, Director, FCC Relations, Bell Atlantic Network Services, Inc., to Gregory J. Vogt, Chief, Tariff Division, FCC (dated May 4, 1994); Letter from Cyndie Eby, Executive Director, Federal Regulatory, US West, Inc., to Gregory J. Vogt, Chief, Tariff Division, FCC (dated May 4, 1994).

[21] The LECs generally claim that this billing practice is consistent with the Commission's restructured rates for transport service. For example, Pacific has observed that paragraph 21 of the Transport Order states that "a flat-rate entrance facilities charge is appropriate because the entrance facilities are dedicated to the sole use of one IXC and, therefore, that IXC should bear the full cost of the facilities." It argues further that paragraph 22 of the Transport Order applies the same reasoning to the billing of direct trunked transport. See Letter from Jo Ann Goddard, Pacific Bell, to Gregory Vogt, Chief, Tariff Division, FCC (dated May 4, 1994). NYNEX argues that the restructure in general changed the billing structure from an equal charge per minute of use (MOU) to a facility-based rate structure. NYNEX adds that "during the conversion of the MOU billing structure to the new facility-based billing structure, the interface level was the key record for determining the party to be billed for the entrance facilities." See Letter from Kenneth Rust, NYNEX, to William F. Caton, Acting Secretary, FCC (dated May 4, 1994). It thus appears that NYNEX has decided to bill AT&T for the entrance facilities because AT&T requires that connections be made to its POP at a DS1 interface level.

[22] Southwestern Bell Telephone Company Tariff F.C.C. No. 73, § 6.8.15; NYNEX Telephone Company Tariff F.C.C. No. 1, § 6.7.14.

capacity facilities from NYNEX for connection to the IXC's higher capacity facilities. NYNEX then maintains separate facility and billing records for each customer. Unlike Southwestern and NYNEX, however, many LECs have no plans to provide a billing option that would apportion the charges for high capacity transport facilities among several customers, and are opposed to this approach. The effect of split billing on AT&T's tariff transmittal is discussed in para. 58 of this Order.

D. Transmittal 6788

14. AT&T responded to the LECs' new billing practice by proposing to resell the service that the LECs bill to AT&T. AT&T determined that if the LECs billed AT&T for the entire charge for flat-rated entrance and direct trunked transport facilities used to provide Feature Group A access, AT&T would in turn bill the LECs' existing Feature Groups A and B access customers for these charges. During the transport tariff review proceeding,[23] AT&T objected to, and has apparently declined to use, the billing options in the NYNEX and Southwestern tariffs that permit the apportionment of charges for high capacity facilities used to provide Feature Group A voice grade service among multiple Feature Group A customers. AT&T claims these billing options would still hold it, as the "primary customer," responsible for any unused capacity or unpaid charges of the secondary customers.[24] By Transmittal 6788, AT&T proposes to offer, on a resale basis, the two flat-rated local transport portions of Feature Group A and B access service -- the entrance facility and direct trunked transport rate elements -- in conjunction with the interexchange private line services that AT&T was already providing.

15. Transmittal 6788 defines a "Feature Group A Connection" as a transmission path between the line side of a LEC end office switch and the AT&T POP for connection to AT&T Private Line services. Transmittal 6788 states that a Feature Group A Connection provides line side access to a LEC end office switch, with an associated seven digit local telephone number, for an AT&T end user customer's use in originating and terminating calls. Similarly, Transmittal 6788 defines a "Feature Group B Connection" as the transmission path between the trunk side of a LEC end office switch and the AT&T POP for connection to AT&T private line services. It states that a Feature Group B Connection provides trunk side access to a LEC end office switch, with an associated uniform 950-XXXX access code, for an AT&T end user customer's use in originating and terminating calls. Transmittal 6788 also requires parties taking AT&T's Feature Group A or B Connection to purchase an "Access Coordination Function," which authorizes AT&T to design, order, install, and perform other provisioning activities for the end user. The proposed tariff revisions further mandate that a customer must subscribe to AT&T's Feature Group A and B Connection Service when the customer orders the Access Coordination Function for Feature Group A and B switched access service.[25]

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[23] Transport Tariffs Order, 9 FCC Rcd at 423-24.

[24] Id.

[25] See AT&T Tariff F.C.C. No. 11, Sections 8.2.8 and 8.2.9.

16. On August 1, 1994, the Bureau suspended Transmittal 6788 for five months and initiated an investigation to determine the reasonableness of the tariff revisions described in Transmittal 6788.[26] The purpose of this investigation was to determine whether AT&T's offering of Feature Group A and B Connection Service under Transmittal 6788 constitutes an unreasonable practice in violation of Section 201(b) of the Act. The Bureau was particularly concerned that customers of LEC Feature Group A or B access service might be billed under the AT&T tariff for the access portion of their end-to-end service[27] even if they did not order their access service through AT&T. The Bureau was also concerned that AT&T proposed to resell the local transport entrance facility and direct trunked transport rate elements on a bundled basis.

17. The Bureau issued a subsequent Order designating the specific issues to be examined in the investigation, and established schedules and procedures for the filing of the pleadings.[28] In the section below, we discuss those issues and our resolution of them.

III. ISSUE ANALYSIS

18. Section 201(b) of the Act requires that a carrier's "charges, practices, classifications, and regulations" for a communication service be just and reasonable. In the Designation Order, the Common Carrier Bureau specified six issues regarding the reasonableness under Section 201(b) of the rates, terms and conditions of Feature Group A and B Connection Service, as proposed in Transmittal 6788. The issues concern whether: (1) it is a reasonable practice for AT&T to bill an end user customer for AT&T's service when the end user has not affirmatively ordered the service from AT&T; (2) AT&T's bundling the Access Coordination Function with Feature Group A and B Connection Service is a reasonable practice; (3) AT&T's bundling the entrance facility and direct trunked transport rate elements are reasonable; (4) the terms and conditions of service provided under Transmittal 6788 are reasonable; (5) the proposed rates for Feature Group A and B Connection Service are reasonable; and (6) it is a reasonable practice for AT&T to charge Feature Group A and B end users for Feature Group A and B Connection

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[26] Suspension Order, 9 FCC Rcd at 4480, 4483.

[27] Access service is generally comprised of the customer line or loop, a switching element and transport to the IXC POP. An information surcharge and equal access charges may also apply.

[28] AT&T Communications Tariff F.C.C. Nos. 9 and 11, Transmittal No. 6788, CC Docket No. 94-120, 9 FCC Rcd 6077 (Com. Car. Bur. 1994) (Designation Order). The pleading cycle was subsequently amended to accommodate AT&T's request to permit AT&T and other interested parties additional time to prepare their pleadings and responses. See AT&T Communications Tariff F.C.C. Nos. 9 and 11, Transmittal No. 6788, 9 FCC Rcd 6165. (Com. Car. Bur. 1994).

Service in areas in which LECs currently offer split billing arrangements. These issues are discussed separately below.

A. Is it reasonable for AT&T to bill an end user customer for Feature Group A or B Connection Service when an end user has not affirmatively ordered this service from AT&T?

1. Background

19. In the Designation Order, the Bureau asked AT&T whether it is reasonable for AT&T to bill an end user customer for its Feature Group A or B Connection Service when an end user has not affirmatively ordered this service from AT&T. To that end, the Bureau directed AT&T to explain how the end user became an AT&T customer for Feature Group A and B Connection Service. The Bureau also directed AT&T to indicate whether it or the LECs notified end user customers of any changes in either their status as customers or in the billing of Feature Group A and B access service since the transport restructure occurred. Finally, the Bureau directed AT&T to describe in its response how an end user customer can either affirmatively order, or decline to receive, Feature Group A and B Connection Service from AT&T if the customer desires to continue receiving either the entrance facility or direct trunked transport rate elements from the LECs.

2. Pleadings

20. AT&T. In its Direct Case, AT&T contends that customers that use Feature Group A or B to obtain access to AT&T's POPs are now AT&T customers because their Feature Group traffic is riding on facilities for which AT&T is being billed.[29] AT&T claims that, prior to the local transport restructure, the end user customer was the LEC's customer of record and was responsible to the LEC for payment of all related access charges, regardless of whether the end user or AT&T, as the customer's agent, ordered the service from the LEC. According to AT&T, the LECs now bill AT&T for the access facilities used to provide entrance facilities and direct trunked transport for Feature Group A or B access to AT&T's POPs. AT&T argues that it is the LECs' customer of record for the flat-rated rate elements of Feature Group A and B access service, while the end user is the LEC customer of record for the usage sensitive rate elements of the service. It adds that the Feature Group A and B users in question are currently AT&T customers for the interexchange services which connect to the Feature Group A and B access service.[30]

21. AT&T claims it notified all existing Feature Group A and B customers that it expected to file revisions to its interstate tariff to offer a connection service, adding that some

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[29] AT&T Direct Case at Att. 1, pp. 1-3.

[30] Id. at Att. 1, pp. 3-4.

LECs may also have notified end user customers.[31] It asserts that it would have notified existing Feature Group customers that they could either obtain connection service from AT&T or provide AT&T with a disconnect order if Transmittal 6788 had taken effect. AT&T claims that a customer must affirmatively communicate its intent to AT&T to order AT&T's Feature Group A and B Connection Service. AT&T asserts it will not provide resold connection service to a customer who either does not affirmatively request it from AT&T or who notifies AT&T it does not wish to accept the service. It argues that, if a customer does not affirmatively elect to obtain AT&T's Connection Service, or if the customer does not obtain alternative access to the AT&T POP, AT&T will assume the customer "no longer wishes the relevant service" and will "take steps to terminate the current services provided."[32] Finally, AT&T asserts that an end user who desires LEC-provided access service can affirmatively order the LEC service through AT&T as part of AT&T's Access Coordination Function.[33]

22. Oppositions. BellSouth and Southwestern Bell contend that they are properly charging AT&T for the access facilities used to carry traffic to AT&T's POP.[34] BellSouth argues that, contrary to AT&T's assertions, no customer of record existed for dedicated transport services prior to the local transport restructure, because the LECs controlled the circuit facility assignments and determined the facilities over which services were to be provided. BellSouth claims that customers can now order specific facilities which are dedicated to their use, and can control the circuit facility assignments. It argues that the POP owner became the customer of record for the entrance facilities to its POP when the local transport tariffs took effect.[35] Southwestern Bell asserts the Transport Order specified that the LECs should bill the entrance facility and direct trunked transport rate elements on a flat rated basis to the customer using those dedicated facilities. It concludes that the IXC to whom the entrance facilities are dedicated is the appropriate party to be billed for those facilities.[36]

3. Discussion

23. We find that it would be an unreasonable practice under Section 201(b) of the Act for AT&T to bill an end user for Feature Group A and B Connection Service, unless the end

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[31] Id. at Att. 1, pp. 3-5 and Exhibit 1.

[32] Id. at Att. 1, pp. 3-6.

[33] Id. at Att. 1, p. 5.

[34] BellSouth Opposition at 2-3; Southwestern Bell Opposition at 2-3.

[35] BellSouth Opposition at 2-3.

[36] Southwestern Bell Opposition at 2-3.

user has requested such service.[37] AT&T has represented in this proceeding that it will not provide its Feature Group A and B Connection Service absent an affirmative order from a customer. Customers who do not place an order with AT&T for its Connection Service will not be customers of AT&T for its Connection Service. The Feature Group customers must be presented with the options available to them for obtaining the entrance facilities they require, only one of which is that of obtaining the entrance facilities from AT&T.[38]

24. If AT&T chooses to refile its offering, the refiled tariff should reflect its representation that it will not bill a customer for AT&T's Feature Group Connection Service unless the customer places an order with AT&T. Moreover, its tariff should contain specific and clear procedures by which a party wishing to become a customer of AT&T's Feature Group Connection Service can affirmatively place an order with AT&T, and a current customer can disconnect its service with AT&T. We also require that no Feature Group A or B service currently being provided to customers be terminated without at least 30 days' notice to these customers of the new affirmative ordering procedures, and referral to the LECs for information on alternatives to AT&T-provided service.

B. Is AT&T's practice of bundling the Access Coordination Function with Feature Group A and B Connection Service reasonable?

1. Background

25. AT&T Tariff F.C.C. No. 11, Section 3.3.4, currently describes the Access Coordination Function as follows:

> The access coordination function provides for the design, ordering, installation coordination, pre-service testing and service turn-up, trouble sectionalization and restoration coordination on a channel provided by AT&T under this tariff or an equivalent channel provided by the Customer. In addition, the access coordination function is available on Feature Group A and B Switched Access Service channels.

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[37] See Capital Network System, Inc. v. FCC, 28 F.3d 201, 206 (D.C. Cir. 1994).

[38] In these situations, it is possible that the LECs would continue to bill their end user customers for the direct trunked transport facilities for which AT&T now wishes to charge, under Transmittal 6788, as the direct trunked transport portion of its bundled Feature Group Connection Service. This potential double billing situation is addressed below in the portions of this Order which address AT&T's proposals to bundle various service elements under Transmittal No. 6788.

By Transmittal 6788, AT&T proposes to append the following sentence to Section 3.3.4:

> When the access coordination function is ordered for Feature Group A or B switched access service channels, a Feature Group A/B connection, as specified in Section 8.2.8 or 8.2.9, respectively is also required.

The proposed text clearly would "bundle" AT&T's Coordination and Connection Services by requiring customers to order its connection service if they order its coordination service.

26. In the Designation Order, the Bureau asked AT&T whether it is reasonable for AT&T to bundle the Access Coordination Function with Feature Group A and B Connection Service. Specifically, AT&T was asked: (1) how its provision of a coordination service would differ under Transmittal 6788 from the coordination service it has previously provided to customers having voice grade special access service under the Access Coordination Function; and (2) if AT&T does not propose to provide a coordination service, as distinct from end-to-end service, in connection with Feature Group A and B access service, why this practice does not unreasonably restrict customers from taking a portion of their Feature Group A or B access service from the LECs.

27. In the Designation Order, the Bureau also sought to determine whether a Feature Group A or B customer can continue to receive its service from the LEC. A user of voice grade services cannot access an IXC's high capacity network absent a multiplexing function. The Bureau sought to determine how the interface between the LEC's voice grade access service and AT&T's high capacity interexchange network will operate if Feature Group A and B access to AT&T's POPs is not provided by means of AT&T's Feature Group A and B Connection Service, but is instead provided directly by the LECs. To that end, the Bureau directed AT&T to respond to these questions: (1) if the end user customer does not take AT&T's Feature Group A and B Connection Service, can that customer continue to receive Feature Group A or B access service from the LECs using a voice grade connection or must the customer purchase a high capacity facility and incur charges over and above the voice grade rates; (2) who determines the level of the network interface (e.g., voice grade, DS1, or DS3) at an AT&T POP; (3) if AT&T requires the facilities used to provide Feature Group A or B access service to connect at a high capacity interface at AT&T's POP, how will end users be able to use a LEC's voice grade transport and entrance facilities to enter AT&T's POP; or should AT&T, the LEC, or both provide the multiplexing necessary to meet AT&T's interface requirements; and (5) should AT&T, the LEC, or both provide a customer with voice grade transport from the end office to the IXC POP?

2. Pleadings

28. AT&T. AT&T claims that its provision of the Access Coordination Function under Transmittal 6788 does not differ from the coordination service it provided for customers having

a voice grade special access service prior to the local transport restructure.[39] It claims it is willing to continue to offer the Access Coordination Function separately from its proposed Feature Group A and B Connection Service as an option for customers who wish to receive their entire access service and bill from the LECs. AT&T asserts that both coordinated service and end-to-end service require similar ordering, provisioning and maintenance procedures. It adds that customers of the Access Coordination Function would receive the usage-sensitive portion of their Feature Group A or B access service from the LEC, and would receive a usage bill from the LEC and a flat-rated bill from AT&T.[40]

29. AT&T asserts that end user customers who do not take AT&T's Feature Group A and B Connection Service can use the LECs' tariffed access service, but must use a DS1 interface to connect to AT&T's POP.[41] AT&T contends that it requires customers to meet the DS1 interface level requirement it has established for its network. It argues that a carrier offering voice grade access service to end users is obligated to furnish the multiplexing required to deliver traffic to the IXC's POP at the IXC's required interface level, and should seek reimbursement through its access tariff.[42]

30. Oppositions. Bell Atlantic opposes AT&T's DS1 interface requirement. It argues that AT&T's DS1 interface requirement forces users who need only a small number of voice grade circuits to subscribe to DS1 circuits from the LECs to connect to an AT&T POP.[43] Ameritech and US West assert AT&T's DS1 interface requirement is reasonable, but note that small Feature Group A and B access customers will be unable to purchase voice grade facilities directly from a LEC to interconnect with AT&T.[44] BellSouth and Southwestern Bell neither favor nor oppose AT&T's DS1 requirement; rather, they argue that customers who wish to purchase voice grade service have alternatives to subscribing to an IXC which requires DS1 and above interface levels.[45] Southwestern Bell asserts that it offers local transport at both voice

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[39] AT&T Direct Case at Att. 1 pp. 5-7.

[40] Id.

[41] Id. at 7 and Att. 1 pp. 7-8.

[42] Id. at 7 and Att. 1 pp. 8-9.

[43] Bell Atlantic Opposition at 2.

[44] Ameritech Opposition at 2; US West Opposition at 3.

[45] BellSouth Opposition at 3-4; Southwestern Bell Opposition at 3-4. BellSouth argues that customers wishing to use BellSouth's entrance facilities to a POP can negotiate with the IXC to permit the use of lower interface levels to the POP, can order a DS1 or above facility from BellSouth to meet the POP owner's requirement, or can order access services to be provided to an IXC other than AT&T. Southwestern Bell contends that the end user should choose an IXC

grade and DS1 levels, and will not bill an end user for voice grade entrance facilities while actually providing a DS1 level entrance facility.[46]

31. AT&T Reply. AT&T contends that the level of its interface requirement cannot be modified in this investigation because it is not a part of Transmittal 6788.[47] AT&T argues its interface requirement is sensible from a business standpoint for administrative and technological reasons.[48] It repeats that end users who do not wish to use AT&T's Feature Group A and B Connection Service can obtain their access service directly from the LECs, who are obligated as access providers to aggregate the end users' traffic to meet an IXC's interface requirements.[49]

3. Discussion

32. We find that AT&T's bundling of its Access Coordination Function with its Feature Group A and B Connection Service is an unreasonable practice under Section 201(b) of the Act. Contrary to the assertions AT&T advances in its Direct Case, the language added by Transmittal 6788 to Section 3.3.4 constitutes a marked change in the way it provides access coordination, because it makes this service unavailable except to customers of AT&T's own Feature Group Connection Service. AT&T has offered no persuasive justification for the bundling of these service elements, nor has it explained why it should not make the Access Coordination Function available to customers who elect to obtain Feature Group access from the LECs, as has been AT&T's previous practice. Any refiled tariff offering Feature Group A and B Connection Service should reflect AT&T's representation that it will not bundle the Access Coordination Function with its Feature Group A and B Connection Service, and that it will continue to offer its Access Coordination Function to customers whether or not they obtain Feature Group A and B Connection Service from AT&T.[50] Thus, a refiled offering should specifically state that customers obtaining access into AT&T's POP can obtain either AT&T's Access Coordination Function or AT&T's Feature Group A and B Connection Service, or both. A bundled offering of the two services, if offered as an additional option, may be acceptable, provided that the coordination and connection services are made separately available on an unbundled basis.

33. We acknowledge that customers purchasing Feature Group A or B access from the LECs may gain access to AT&T's POP through a LEC-provided DS1 entrance facility. The

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other than AT&T that will either pay for the DS1 interface or accept the voice grade connection.

[46] Southwestern Bell Opposition at 3-4.

[47] AT&T Reply at 2-3.

[48] AT&T Reply at 3.

[49] Id.

[50] AT&T Direct Case at 6.

level of AT&T's DS1 network interface is not a designated issue in this investigation. Therefore, it is not appropriate for us to determine the reasonableness of AT&T's high capacity interface in this order. We neither agree nor disagree in this proceeding with AT&T's contention that its interface requirement is reasonable for administrative or technological reasons. The level of AT&T's interface is not at issue, nor must we address it to determine the reasonableness of Transmittal 6788. Rather, the issue raised is whether Transmittal 6788 is offering an unlawfully bundled service to recoup the expenses incurred from its self-established high capacity requirement. To the extent that AT&T's network interface requirements may bring about additional costs for end users, we believe that these matters are better addressed in other proceedings, such as CC Docket No. 91-213, the local transport rate restructure proceeding.

C. Is AT&T's practice of bundling the entrance facility and direct trunked transport rate elements together reasonable?

1. Background

34. In the Designation Order, the Bureau asked whether AT&T's proposal to bundle the entrance facility and direct trunked transport rate elements together is reasonable. To that end, AT&T was directed to explain why it bundled these two transport rate elements in its Feature Group A and B Connection Service. If AT&T maintained that it cannot offer its connection service on an unbundled basis, the Designation Order required AT&T to explain why it cannot do so and why it is not unreasonable to restrict end user customers' ability to take the unbundled transport rate elements, including usage-based transport, to the entrance facility of the AT&T POP.

2. Pleadings

35. AT&T. AT&T argues that its bundling of the two transport rate elements is reasonable.[51] AT&T contends that an unbundled service offering would not be cost-effective. It argues that it would incur additional multiplexing expenses which would increase rates if, for example, a customer purchased only the direct trunked rate element, because it would have to accept a network interface at below its required DS1 level. Moreover, AT&T claims that its ability to furnish and maintain circuits on an end-to-end basis would be impaired. Finally, it argues, customers would be confused by an unbundled offering.[52] AT&T contends that it is offering the bundled rate elements as an additional option for customers. It argues that customers who wish to obtain the rate elements on an unbundled basis can do so from the LEC. AT&T asserts it is willing to amend its tariff to show separate charges for the direct trunked

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[51] Id. at Att. 1 pp. 9-11.

[52] Id. at Att. 1 pp. 10-11.

transport and entrance facilities rate elements to enable customers to obtain more detailed information for comparative purposes. [53]

36. Oppositions. Ameritech and Pacific argue that AT&T's proposal to sell the direct trunked transport and entrance facilities rate elements on a bundled basis will cause double billing.[54] Ameritech claims that it bills the Feature Group A customer, not AT&T, for direct trunked transport between the dial tone office and the serving wire center.[55] Similarly, Pacific claims that it bills the end user for direct trunked transport when AT&T orders a Feature Group A DS0 between an end office and the AT&T POP as the end user's agent.[56] Southwestern Bell, however, supports AT&T's proposal to bundle the two rate elements, claiming that end users have options other than taking AT&T's bundled service.[57] US West states it is unaware of any legal impediment to reselling the facilities on a bundled basis.[58]

37. AT&T Reply. In its reply, AT&T again contends that the "bundling" of two resold LEC rate elements for reasons of efficiency and cost-effectiveness is not an unreasonable practice when the separate components are available from the LECs.[59]

3. Discussion

38. At least two carriers, Ameritech and Pacific, assert they charge the end user, not AT&T, for the direct trunked portion of transport. They do not bill AT&T because the end user, not AT&T, is their designated customer for direct trunked transport.[60] We find that AT&T may not reasonably offer for resale a portion of access for which it is not being billed. If AT&T in its Connection Service bundles together the rate elements for the entrance facilities and direct trunked transport portions of its service, customers who receive LEC-provided direct trunked transport but require entrance facilities provided by AT&T will still be billed by AT&T for direct trunked transport. AT&T's offer to show separate charges in its tariff for the entrance facility and direct trunked transport portions of its service does not eliminate the likelihood that

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[53] Id. at 8.

[54] Ameritech Opposition at 2-3; Pacific Opposition at 1-2.

[55] Ameritech Opposition at 2-3.

[56] Pacific Opposition at 1-2.

[57] Southwestern Bell Opposition at 1-2.

[58] US West Opposition at 2 and 2 n.3.

[59] AT&T Reply at 2.

[60] Ameritech Opposition at 2-3; Pacific Opposition at 1-2.

some customers will be charged twice for the direct trunked transport rate element. Further, by doing so, AT&T would shift the primary burden for resolving payment to customers of the service, many of whom may be less sophisticated than AT&T or the LEC.

39. We reject AT&T's argument that its bundled transport resale offering is merely an additional option for end user customers. Bundling is an additional option, as AT&T contends, provided customers have realistic alternatives. LECs have suggested that their Feature Group A and B access customers could purchase an entire DS1 entrance facility. Feature Group A and B access, however, is a voice grade service. Customers of this service require only a voice grade analog connection. While these customers may reject the option of purchasing an entire DS1 facility as expensive and inefficient, even this limited degree of unbundling is not available under Transmittal 6788. Customers purchasing their own DS1 facility may use as little as 1/24th of a DS1 facility, which can provide connections for twenty-four voice grade channels. Alternatively, a LEC could bill a single end user for a fractional share of the DS1, enabling multiple users to use the LEC's high capacity facility. This alternative makes voice grade access to AT&T's POP available through a billing mechanism rather than through the sale of high capacity multiplexing services to end users. We are aware of only two LECs that currently offer a "split billing" mechanism.[61] Neither AT&T nor the LECs have suggested alternatives which are realistic at this time for most end users.

40. We therefore conclude that it is unreasonable for AT&T to offer the direct trunked transport and entrance facilities rate elements for resale under Section 201(b) of the Act exclusively on a bundled basis. If AT&T wishes to provide Feature Group A or B entrance facilities and direct trunked transport on a resale basis, it may do so, but such resale must be offered on an unbundled basis. A bundled service offered as an additional option may be acceptable if the resold direct trunked transport rate element is made separately available from the entrance facilities.

41. By Transmittal 6788, AT&T is attempting to recoup the costs for transport, which it obtains from the LECs on an unbundled basis. It is within AT&T's discretion to recoup those costs in any manner that is not found unlawful. AT&T has decided to recover those costs through the resale of Feature Group A and B access. However, in this order we find that the bundled tariff which AT&T has filed for this purpose is unlawful. By finding its bundled offering unlawful, we are not placing AT&T in a position where it cannot recoup the transport costs for which it is being charged. AT&T may refile an unbundled tariff at its discretion, thus recouping its costs. To the extent that AT&T incurs any additional costs in providing unbundled access, it may establish rates which recoup not only its access costs, but those additional costs as well.

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[61] Southwestern Bell Telephone Company Tariff F.C.C. No. 73, § 6.8.15; NYNEX Telephone Company Tariff F.C.C. No. 1, § 6.7.14.

D. Are the terms and conditions of service provided under Transmittal 6788 reasonable?

1. Background

42. In the Designation Order, the Bureau sought to determine whether the terms and conditions of service provided under Transmittal 6788 are reasonable. AT&T was directed to respond to the following questions: (1) is the existing Feature Group A and B traffic transported on facilities used to provide both special and switched access, or on facilities used to provide other switched access services; (2) does AT&T or the LEC determine the facilities over which the traffic travels? Does AT&T or the LEC control the assignment of circuits on these entrance facilities terminating at AT&T's POP; and (3) if AT&T controls this function, how can the Feature Group A or B end user remove its traffic from those entrance facilities to avoid being charged by AT&T for its use of the entrance facilities?

2. Pleadings

43. AT&T. AT&T responds that the transport facilities that the LECs bill AT&T for use in providing the existing Feature Group A and B traffic are "only used to provide special access services; no other switched access service traffic is carried on them. For transport facilities that the LECs charge AT&T as the Feature Group A or B customer of record, only Feature Group A or B traffic is carried."[62] AT&T states that the LECs determined over which facilities the Feature Group A or B traffic traveled prior to the local transport restructure. It claims that all LEC entrance facilities and direct trunked facilities carrying Feature Group A or B traffic are now being charged to AT&T. AT&T claims that it uses its Connecting Facility Assignment, or CFA, control system to manage the assignment of circuits on entrance facilities terminating at its POP. AT&T argues that end users should remove their traffic from the entrance facilities charged to AT&T if they do not order AT&T's Connection Service.[63]

44. Oppositions. Bell Atlantic disagrees with AT&T's assertion that all LEC entrance facilities and direct trunked facilities carrying Feature Group A or B traffic are now being charged to AT&T.[64] Bell Atlantic asserts that it bills end users directly for the direct trunked service when it multiplexes DS1 facilities at the serving wire center. It argues that AT&T's practices will cause double billing.[65] Southwestern Bell argues that AT&T, not the LEC, had

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[62] AT&T Direct Case at Att. 1 p. 11.

[63] Id. at Att. 1 p. 12.

[64] Bell Atlantic Opposition at 2, citing AT&T Direct Case, Att. 1 at 12.

[65] Bell Atlantic Opposition at 2-3.

CFA control of the facilities Southwestern Bell provided to AT&T's POP prior to restructure, and thus became the local transport facility customer under the local transport restructure.[66]

45. AT&T Reply. AT&T claims the potential for double billing will not affect new customers, as they will be provisioned differently than current customers.[67] With respect to current Feature Group customers, AT&T claims it will "take the necessary steps, in consultation with the LECs, to ensure that no such double billing of an access element results." It claims it will work with the LECs either to eliminate multiple charges, or to ensure the customer's bill is credited to ensure that the customer does not pay twice. In addition, AT&T claims that its commitment to identify separate rates for the two resold LEC access services and to notify customers of possible double billing protects customers, who will detect that they are being billed by both AT&T and the LEC for the same items.[68]

3. Discussion

46. For the reasons stated above in the discussion of AT&T's bundling of the services and rate elements under Transmittal 6788, we conclude that the terms and conditions in AT&T's tariff are unreasonable under Section 201(b) of the Act. LECs do not uniformly bill AT&T or the end user for all the flat-rated transport facilities used in providing Feature Group A or B access service. AT&T has admitted that, under a bundled offering, it is likely to bill at least some current Feature Group A or B access users for a rate element that these customers already obtain from the LECs. Its offer to mitigate potential double billing by identifying separate charges for the entrance facility and direct trunked transport rate elements on the customer's bill does not prevent the customer's being double billed. This "solution" merely shifts the primary burden of resolving the double billing problem from AT&T to the customer, who then must negotiate with both the LEC and AT&T in an attempt to prevent its paying twice for a situation that the customer did not create.

47. AT&T's offer to credit the customer's bill in the case of double billing is also unsatisfactory. Such a solution may be unlawful under Section 203 of the Communications Act, which states that a common carrier may not "refund or remit by any means or device any portion of the charges so specified, except as specified" in the tariff.[69] AT&T must include a separate option corresponding to each set of rates that it proposes to assess. It cannot offer the same service for two different sets of rates. Thus, the effective solution to such double billing is the unbundling of the services and rate elements.

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[66] Southwestern Bell Opposition at 5.

[67] AT&T Reply at 4-5.

[68] Id. at 4 n.10.

[69] Section 203(c) of the Communications Act of 1934, 47 C.F.R. § 203(c).

E. Are the charges proposed to be included in Tariffs 9 and 11 pursuant to Transmittal 6788 reasonable?

1. Background

48. In the Designation Order, the Bureau sought to determine the reasonableness of the charges AT&T proposed to include in Tariffs 9 and 11 pursuant to Transmittal 6788. To that end, AT&T was directed to: (1) provide an example of how it derived the nonrecurring and recurring charges it proposes to assess, and to describe in detail the actual costs that are reflected in the nonrecurring and recurring charges, and the source of those costs;[70] (2) explain why a non-recurring charge is included in the rates for the connection service it proposes, and explain how it derived the non-recurring charge it proposes to assess; and (3) explain why it is not unreasonable to fail to exempt these customers from its nonrecurring charge, because the end user customers for this service are current LEC customers and because they currently appear to have in place the facilities for Feature Group A or B access service.

2. Pleadings

49. AT&T AT&T claims it based its proposed nonrecurring and recurring charges on expected demand for the service, the costs assessed it by the LECs, and market constraints on the connection charges.[71] Further, AT&T asserts that its connection charges, which are in Tariff 11, should not be subject to price cap regulation because customers have alternatives to AT&T service. It argues that the Commission's regulation of the underlying LEC services is sufficient to ensure AT&T's Tariff 11 rates are reasonable.[72] AT&T also claims it incurs nonrecurring charges when it installs a new service. It claims it would exempt all embedded base customers associated with the Feature Group A or B service from the nonrecurring charge.[73]

50. Opposition. Southwestern Bell supports AT&T's contention that Transmittal 6788 offers a Tariff 11 type service that should not be subject to price cap regulation.[74]

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[70] This description should include the cost of the actual high capacity facilities used for Feature Group A and B Connection Service -- not the full voice grade charges.

[71] AT&T Direct Case at Att. 1 pp. 13-15.

[72] Id. at 11-12 and Att. 1 p. 14.

[73] Id. at Att. 1 p. 15.

[74] See Southwestern Bell Opposition at 2.

3. Discussion

51. We conclude that AT&T has not demonstrated that its proposed recurring charges are reasonable, but we make no finding in this Order that these charges are unreasonable. AT&T's assertions as to the unreviewability of the cost support for its purportedly streamlined service presume the presence of competitive alternatives to its service, which necessitates the unbundling of the entrance facility and direct trunked transport rate elements of the service it proposes to offer. If end users could purchase the entrance facility and direct trunked transport portions of the service separately from AT&T or the LECs, we might grant more credence to AT&T's primary argument: that market conditions and the LECs' tariffed rates will impose constraints on rates that customers will be willing to pay for the resold service. As we stated earlier, if AT&T wishes to provide Feature Group A or B entrance facilities and direct trunked transport on a resale basis, it may do so, but such resale must be offered on an unbundled basis. AT&T should conform any refiled tariff to its assertion that it will not impose the nonrecurring charge on customers who currently have Feature Group A or B services, but will charge only customers new to AT&T's Connection Service and related Tariff 9 services. Any changes in rate levels resulting from an unbundling by AT&T of its resold Feature Group A and B Connection Service may be made subject to investigation by Bureau order.

F. Is AT&T's practice of charging Feature Group A and B end users for Feature Group A and B Connection Service reasonable in areas where LECs currently offer split billing arrangements?

1. Background

52. The Designation Order sought to determine whether AT&T's practice of charging Feature Group A and B end users for its Feature Group A and B Connection Service is reasonable in areas where LECs currently offer split billing arrangements. AT&T was asked to: (1) describe currently available LEC split billing or other methods of LEC billing end user customers directly for the customer's portion of the high capacity facilities used; (2) discuss whether the current forms of split billing are reasonable. AT&T should also indicate whether these arrangements or some other form of split billing would solve the Feature Group A and B billing problem from the point of view of the end user customer and from AT&T's point of view; (3) to the extent split billing is available, AT&T should explain why it has failed to consider using that or other billing options so that end users can be billed only for the portion of the high capacity facilities used to transport their voice grade Feature Group A and B access traffic to AT&T's POP. AT&T should also explain why, in light of the existence of these split billing options, AT&T's practice of billing the Feature Group A and B end users under Transmittal 6788 is not unreasonable under Section 201(b) of the Act; and (4) explain whether it could use the mechanism in Tariff 11, Section 3.3.6, "Arrangement for LEC Use of Existing High Capacity Access" provided to AT&T, to recover from the LEC for LEC use of AT&T high capacity facilities to transport Feature Group A and B traffic to the AT&T POP.

2. Pleadings

53. AT&T. In its Direct Case, AT&T claims split billing is unacceptable in its present form.[75] It contends that costs associated with multiplexing, fill and maintenance expenses are not included by LECs when they compute the 1/24 (for a DS1 rate) or 1/672 (for a DS3 rate) reimbursement amount. It also argues that, under split billing, the LECs hold AT&T liable for payment if the end user defaults because AT&T is the customer of record. AT&T claims knowledge of only Southwestern Bell Telephone's tariffed split billing option. It contends that its tariff is not unreasonable even if split billing is unavailable.[76] AT&T also argues that Billing and Collection arrangements would create additional expenses for end users. According to AT&T, under a Billing and Collection arrangement, LECs bill the end user rates established by AT&T. AT&T asserts that it would pass on to the user any additional charges assessed it by the LECs under a Billing and Collection arrangement. [77]

54. Finally, AT&T asserts that it cannot use Section 3.3.6 in Tariff 11 to recover from the LECs for the LECs' use of AT&T's high capacity facilities to transport Feature Group A and B traffic to the AT&T POP.[78] It claims that the referenced tariff section presumes that end user customers are LEC customers, and that the end user customers are the relevant customer of record. AT&T claims that the LECs have made AT&T the customer of record for the flat-rated portion of Feature Group A and B.[79]

55. Oppositions. Ameritech, BellSouth, and US West oppose split billing.[80] Ameritech asserts that, because many LECs bill the IXC for the dedicated entrance facility, IXCs seek to recoup the costs of these dedicated entrance facilities in rates to its customers through tariffs such as Transmittal 6788. This is reasonable, Ameritech asserts, because otherwise customers receive a windfall at the expense of the IXC.[81] Ameritech and US West argue that, because AT&T reasonably declines to accept traffic at lower than DS1 interface levels, and because split billing is too uneconomical to be satisfactory, Transmittal 6788 is a way for users to obtain only

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[75] AT&T Direct Case at Att. 1 p. 1.

[76] Id. at Att. 1 pp. 15-17.

[77] Id. at Att. 1 p. 17.

[78] Id. at Att. 1 p. 18.

[79] Id.

[80] Ameritech Opposition at 2; BellSouth Opposition at 7-8; US West Opposition at 4.

[81] Ameritech Opposition at 2.

the level of facilities they require for their Feature Group A or B service.[82] Southwestern Bell agrees with AT&T that split billing is irrelevant to whether AT&T's efforts to resell the Entrance Facilities and Direct Trunked Transport rate elements are reasonable.[83]

56. BellSouth claims that a billing and collection arrangement would best meet the needs of customers expressing a need for an alternative arrangement to the existing LEC tariffed shared network arrangements.[84] It contends that either a LEC, on a detariffed basis, or a third party billing and collection agent could receive, manage and process information provided by multiple sharing entities while at the same time ensuring protection of confidential information as well as provide fundamental billing and collection services.[85] Alternatively, BellSouth proposes the LEC could provide voice grade access services to its customers not based on the facilities actually utilized, but based on the voice grade capacity ordered by the customer.[86]

57. AT&T Reply. AT&T argues that the comments uniformly show that split billing does not address AT&T's being billed by the LECs for the entrance facility transport element, and that the absence of split billing offerings by the LECs should not preclude AT&T's offering of Feature Group A and B Connection Service.[87]

3. Discussion

58. Split billing is a billing arrangement that enables multiple customers to share or resell entrance facilities and direct-trunked transport facilities.[88] The question of split billing requirements was recently raised in the Supplemental Notice of Proposed Rulemaking in CC

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[82] Id. ; US West Opposition at 4-5. US West estimates that four percent of its Feature Group A lines -- approximately 300 AT&T end-user lines -- would be affected by any decision as to how to deal with the incompatibility between voice grade facilities and AT&T's DS1 interface requirement. US West Opposition at 5 n.8.

[83] Southwestern Bell Opposition at 2.

[84] BellSouth Opposition at 4-6.

[85] Id. at 5-6.

[86] Id. at 6-7.

[87] AT&T Reply at 2.

[88] See Transport Rate Structure and Pricing, CC Docket No. 91-213, Third Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, FCC No. 94-325, rel. Dec. 22, 1994.

Docket No. 91-213, which was adopted on December 15, 1994.[89] In light of the fact that we have found AT&T's tariff unlawful on other grounds, we decline to make any determinations regarding the reasonableness of AT&T's practices vis-a-vis LEC split billing. As for the mechanism in AT&T's Tariff 11 involving LEC charges, we similarly decline to interpret Section 3.3.6 of Tariff 11 at this time.

IV. CONCLUSION

59. In this Order, we find that it is unreasonable for AT&T to automatically bill end users for its Feature Group A and B Connection Service in the absence of an affirmative order from prospective customers. We conclude that it is unreasonable for AT&T to offer for resale in its Feature Group Connection Service the entrance facility and direct trunked transport rate elements on an exclusively bundled basis. We also conclude that it is unreasonable for AT&T to bundle its Access Coordination Function with its Feature Group A and B Connection Service. We make no conclusion as to the reasonableness of the charges in Transmittal 6788, absent unbundling of the entrance facility and direct trunked transport rate elements. AT&T may, if it chooses, offer Feature Group A and B Connection Service by filing a tariff that reflects our findings in this investigation, as specified in this Order, to be effective on 45 days' notice.

V. ORDERING CLAUSES

60. Accordingly, pursuant to Sections 4(i), 4(j), 201(b), 204(a), 205(a) and 403 of the Communications Act of 1934, 47 U.S.C. § § 154(i), 154(j), 201(b), 204(a), 205(a) and 403, WE FIND that AT&T Communications Tariff Nos. 9 and 11, Transmittal No. 6788, IS UNLAWFUL for the reasons specified in this Order.

61. IT IS ORDERED that AT&T Communications, Inc. SHALL FILE tariff revisions removing the tariff revisions filed under Transmittal No. 6788 no later than five days from the release date of this Order, to be effective on one day's notice.

62. IT IS FURTHER ORDERED that the investigation and accounting order imposed by the Common Carrier Bureau in CC Docket No. 94-120 IS TERMINATED.

63. IT IS FURTHER ORDERED that this Order takes effect on the date of its release.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[89] Id.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-59

In the Matter of	)	WT Docket No. 95-26
	)	
Commercial Realty St. Pete, Inc., James C. Hartley, Teresa Hartley, and Ralph E. Howe	)	

ORDER TO SHOW CAUSE

Adopted: February 15, 1995 Released: February 16, 1995

By the Commission:

I. INTRODUCTION

1. On August 30, 1994, the Commission initiated a non-public investigation of the conduct of applicants in the Interactive Video and Data Services (IVDS)[1] to determine whether any misconduct in the auctions occurred.[2] The Commission's investigation involved, inter alia, Commercial Realty St. Pete Inc. (Commercial Realty) and its principals. Based upon the record developed thus far in that investigation, we are initiating the instant proceeding for Commercial Realty and its principals, James C. Hartley, Teresa Hartley, and Ralph E. Howe, to show cause why they should not be barred from participating in any future Commission auctions and from holding any Commission licenses. Additionally, we are authorizing the presiding administrative law judge to impose forfeitures if it is concluded that Commercial Realty and/or its principals misrepresented facts to the Commission during the IVDS application process.

II. BACKGROUND

2. In its Second Report and Order, 9 FCC Rcd 2348 (1994), the Commission established eligibility and other general rules that would govern the award of bidding credits and other benefits in Commission auctions to certain designated entities, including businesses

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[1] IVDS is a point-to-multipoint, multipoint-to-point, short distance, communications service in which licensees may provide information, products, or services to individual subscribers located at fixed locations in the service area, and subscribers may provide responses.

[2] See Order, FCC 94-222, GN Docket 94-96 (released Aug. 30, 1994).

owned by women. The Commission stated that in order to qualify as a woman-owned business, women must have at least a 50.1 percent equity ownership and a 50.1 percent controlling interest in the entity. It stated further that "applicants must ensure and be prepared to demonstrate that de facto control truly resides with . . . female principals.[3] In its Fourth Report and Order, 9 FCC Rcd 2330 (1994), the Commission stated that the aforementioned eligibility requirements would apply to entities seeking bidding credits for IVDS licenses.[4] In addition, to ensure that winning bidders would be able to pay the full amount of their bids, the Commission required applicants claiming status as small businesses to tender a down payment equal to 10 percent of each winning bid (or adjusted bid, if a bidding credit was claimed) within five business days after the close of bidding. See 47 C.F.R. § 95.816(c)(4).

3. Additionally, the Second Report and Order adopted specific rules aimed at prohibiting collusive conduct in the context of competitive bidding. See 47 C.F.R. § 1.2105(c). These rules were designed to protect the integrity of the auctions and prohibit conduct that could "undermine the competitiveness of the auction process and prevent the formulation of a competitive post-auction market structure."[5] The Commission, in its Fourth Report and Order, supra, made the anti-collusion rules applicable to bidders in the IVDS auctions.[6] In addition to requiring disclosure of certain agreements, the rules prohibit all bidders from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders until the winning bidder has made its required down payment.[7]

4. Commercial Realty is a for-profit company incorporated in Florida. From the time of its incorporation until 1989, James C. Hartley served as Commercial Realty's sole director. President, and Registered Agent. Ralph E. Howe is identified on company documents filed with the Florida Department of State as the current director, President, and Registered Agent. On February 17, 1994, Mr. Hartley's wife, Teresa Hartley, entered into an agreement for Sale and Purchase of Corporate Stock, pursuant to which she purchased all of the outstanding shares of stock in Commercial Realty for $500.

5. On June 13, 1994, Mrs. Hartley executed a Written Action of the Board of Directors of Commercial Realty which authorized Mr. Hartley to enter into and execute the IVDS applications, contracts, and any other documents for the purchase of IVDS licenses. The

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[3] See Second Report and Order, 9 FCC Rcd at 2396-97.

[4] A twenty-five percent bidding credit for one of the two IVDS licenses in each market was available to a winning bidder that qualified as a female and/or minority-owned business.

[5] Second Report and Order, 9 FCC Rcd at 2387.

[6] See Fourth Report and Order, 9 FCC Rcd at 2335.

[7] Second Report and Order, 9 FCC Rcd at 2387-88.

Written Action also authorized Mr. Hartley to acquire a 40 percent voting interest in, and become the sole director of, the company.

6. On June 23, 1994, Commercial Realty filed with the Commission an FCC Form 175 (Application to Participate in an FCC Auction), wherein Commercial Realty certified that it was a woman-owned small business, and that it was legally, technically, and financially qualified as an applicant. The certification was signed by Mr. Howe, who identified himself as a director of Commercial Realty. On its FCC Form 175, Commercial Realty specified its intention to bid for licenses in up to 277 markets.

7. On July 28 and 29, 1994, the Commission held an auction for IVDS licenses. Commercial Realty was a successful bidder in 20 IVDS markets.[8] Commercial Realty submitted bids in these 20 markets totalling $41,250,000. Because it claimed bidding credits in all but three of the markets, Commercial Realty's adjusted bids totalled $32,762,500. Based on its total adjusted bids, Commercial Realty was required to make a down payment to submit additional funds necessary to bring its total deposits with the Commission up to at least $3,266,750. The down payment was due on August 8, 1994. Commercial Realty failed to tender any down payment on August 8, 1994, and therefore was in default.[9]

8. Prior to Commercial Realty's default, the Commission became aware of actions taken by Mr. Hartley in attempting to have other winning bidders join him in petitioning the Commission to delay the down payment deadline. On August 3, 1994, Mr. Hartley transmitted by facsimile a letter to at least 15 of the other winning IVDS bidders urging them to join his petition. Mr. Hartley also sent an accompanying form letter the recipients could use to contact Commercial Realty's communications counsel and members of Congress to join him in his pursuit of delaying the down payment deadline. In response to this letter and the interest and confusion it created among other winning bidders, the Commission issued a Public Notice entitled "IVDS Bidder Alert," which stated unequivocally that the deadline would not be altered and warned that bidders who failed to submit their down payments by the deadline would be in default.[10] This Public Notice was sent by overnight delivery to each IVDS winning bidder, including Commercial Realty.

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[8] Commercial Reality submitted high bids in the following markets: Detroit-Ann Arbor, MI, St. Louis, MO, Miami, FL, Pittsburgh, PA, Baltimore, MD, Minneapolis-St. Paul, MN, Atlanta, GA, San Diego, CA, Denver-Boulder, CO, Seattle-Everett, WA, Milwaukee, WI, Tampa-St Petersburg, FL, Kansas City, MO, Phoenix, AZ, Indianapolis, IN, Portland, OR, Sacramento, CA, Greensboro, NC, Charlotte, NC, Raleigh-Durham, NC.

[9] On August 16, 1994, Commercial Realty, and other winning bidders, filed with the Commission requests for waivers or special relief which would allow them to delay making the required down payment. Those requests were denied by the Commission. See Order, 9 FCC Rcd 6384 (Com. Car. Bur. 1994), applications for review and petitions for reconsideration pending

[10] See Public Notice, "IVDS Bidder Alert," released August 5, 1994.

9. In a declaration, dated August 15, 1994, submitted with a "Petition for Extraordinary Relief" dated the same day, Mr. Hartley declared, "under penalty of the laws of perjury" that prior to attending the auction, he had made arrangements to obtain immediate financing for up to $4 million from a private investor. Mr. Hartley declared that this investor (also referred to as his "lender") "gave me an absolute commitment that an amount up to $4 million dollars [sic] would be immediately available to cover my purchases." In another petition seeking to expand the scope of the Commission's investigation of IVDS auction misconduct, Commercial Realty submitted a Declaration prepared under penalty of perjury which purportedly documented that Commercial Realty had accepted a loan of $4 million from Dean H. Tyler in order to purchase IVDS licenses. According to the Declaration, which bore the date June 13, 1994, Mr. Tyler swore:

> I hereby affirm and declare that I had the sum of $4,000,000 available to me through funds in banks and other investors, at the time I made the commitment and I earmarked that sum for the interactive video data services auction which, I understood, would take place in late July, 1994.

10. Mr. and Mrs. Hartley initially refused to participate in the Commission investigation into the practices of IVDS applicants and defied subpoenas directing them to provide information and to testify. On December 20, 1994, a United States District Court judge granted the government's petition to enforce the subpoenas and denied a motion to stay.[11] Mr. and Mrs. Hartley did testify on January 18 and 19, 1995.

III. DISCUSSION

11. The Commission previously determined that "if [an auction] default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may also declare the applicant and its principals ineligible to bid in future auctions, and may take other action that it may deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant."[12] As discussed below, we find that Commercial Realty and its principals engaged in gross misconduct. Based upon the Commission's investigation of this misconduct, we believe that further action should be taken to disqualify Commercial Realty from future auctions and from holding any Commission license. In a separate action, we are also imposing a forfeiture of $390,000 against Commercial Realty for violations established by the investigation. Further action will be taken to dismiss Commercial Realty's applications for failure to tender any down payment and, upon reauction, to impose the default penalties required by Sections 1.2104(g) and

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[11] See United States of America v. Commercial Realty St. Pete, Inc., et al., No. 94-345 (D.D.C. Dec 21, 1994), appealed sub nom. Commercial Realty St. Pete, Inc. v. U.S., No. 94-5391 (D.C. Cir docketed Dec. 30, 1994).

[12] Second Report and Order, supra, at ¶ 198; Fourth Report and Order, supra, at ¶ 28.

95.816(c)(6)(i) of the Commission's Rules.

A. False Financial Declarations

12. In our investigation, we learned that the Declarations provided by Mr. Hartley and Dean H. Tyler were false. Mr. Tyler testified as a part of our investigation under a grant of immunity that despite the claims made in his Declaration filed with Commercial Realty's pleading, he never made a commitment to loan $4,000,000 to Commercial Realty. In fact, Mr. Tyler did not personally have that much money, he had never earmarked any amount for IVDS, and in any event, he would have insisted on an equity interest in the venture, not merely some rate of return on investment, as a precondition to making a loan. Mr. Tyler additionally testified that prior to the auctions he and Mr. Hartley never discussed a particular dollar amount that Mr. Hartley would need from Mr. Tyler. According to Mr. Tyler, Mr. Hartley drafted Tyler's Declaration and included the $4,000,000 amount Mr. Hartley knew he needed for a down payment.

13. Mr. Tyler in his testimony stated that he knew the information in his Declaration was false when he signed it. He further testified that he only signed it because Mr. Hartley assured him that the technology for IVDS would not work and, therefore, Commercial Realty would not need the $4,000,000 referenced in the Declaration. Mr. Hartley told Mr. Tyler, according to Mr. Tyler's testimony, that he needed the Declaration because of the Commission investigation.

14. Mr. Hartley, on the other hand, testified that he did not prepare the Tyler Declaration. He stated that his counsel, Lauren Colby and Richard Avis, prepared that Declaration. Mr. Hartley stated that Tyler's Declaration was only to state what had already taken place and that he did not think the Declaration was necessary. Moreover, Mr. Hartley testified that Mr. Tyler had committed to loan Commercial Realty $4,000,000. However, Mr. Hartley presented no written evidence to back up his testimony.

15. It appears that Commercial Realty misrepresented facts to the Commission in both Mr. Hartley's Declaration and Mr. Tyler's Declaration. It is apparent from both Mr. Tyler's and Mr. Hartley's testimony that although the Tyler Declaration is dated June 13, 1994, it was not signed until after the IVDS auctions. Therefore, we know that Commercial Realty submitted this document to the Commission, intending the Commission to rely on the information contained therein, which bore a falsified date and apparently false information. Because of the contradictory testimony of Mr. Tyler and Mr. Hartley about who prepared the Tyler Declaration and why it was to be submitted to the Commission, we cannot presently determine the veracity of the other material information in that Declaration or the one signed by Mr. Hartley. Accordingly, appropriate issues will be designated to determine whether Commercial Realty, or its principals, misrepresented facts, lacked candor, or attempted to mislead the Commission about Commercial Realty's ability to pay its down payment. If so, the presiding officer shall determine whether Commercial Realty should be subject to a forfeiture up to the statutory limit for one or both violations, and whether it and its principals

should be barred from future auctions and from being Commission licensees. Moreover, if it is determined that Mr. Hartley intentionally misrepresented facts in either of these Declarations or other papers or testimony submitted to the Commission, because of the seriousness of such misrepresentations, we will refer any violations to the Department of Justice for possible criminal prosecution.

B. False Designated Entity Certification

16. The Commission's investigation reveals that Mr. Hartley appears to have controlled virtually all significant matters affecting Commercial Realty. In this regard, we find that Mr. Hartley was solely responsible for: speaking with Mr. Tyler about financing; requesting Richard Kent (his sister-in-law's brother) to assist in the bidding process; retaining attorney William Franklin to be Commercial Realty's communications counsel, directing Mr. Franklin's activities on behalf of the company, and paying Mr. Franklin for his services; retaining Steven Schupak to be Commercial Realty's technical consultant, directing Mr. Schupak's activities on behalf of the company, and paying Mr. Schupak for his services; retaining Kellie Boyle to perform public relations services on behalf of the company, directing Ms. Boyle's activities, and paying Ms. Boyle for her work; meeting with Fernando Morales of Interactive Return Service, a company which manufactures IVDS equipment; visiting the facilities at EON Corporation, a communications company with the technology for transmitting digital messages at the frequencies allocated by the Commission for IVDS, for a tour and product demonstration; encouraging other bidders to join with Commercial Realty in petitioning the Commission to delay the down payment deadline; incorporating American Interactive Consultants for the purpose of marketing interests in Commercial Realty's license; developing a Business Plan Summary for American Interactive Consultants; extending an offer to sell a minority stake in Commercial Realty for $40,000,000 to Thomas Milmo, Chairman of the Board of Eon; and deciding that Commercial Realty would not make its down payment to the Commission. But for the fact that she signed some checks, the Commission investigation found no evidence that Mrs. Hartley ever took any actions on behalf of Commercial Realty. Mrs. Hartley, by her own testimony, made no decisions on behalf of Commercial Realty, but instead, left it to her husband to make all corporate decisions.

17. These above actions were taken by Mr. Hartley despite the fact that Commercial Realty claimed a bidding credit for being a woman-owned company. As stated previously, the Second Report and Order required that, in order to be eligible for the credit, both at least 50.1 percent of the equity and de facto control must reside with women or minorities.[13] It is quite clear from all the facts, as shown above, Commercial Realty inappropriately claimed a bidding credit for being a woman-owned company because de facto control of the company was not in the hands of Mrs. Hartley. It also appears that the Hartleys intended to falsely represent Commercial Realty to be a woman-owned company in order to obtain bidding credits. Based on the fact that Mrs. Hartley did not exercise de facto control of the applicant, an appropriate

[13] Second Report and Order, 9 FCC Rcd at 2396-97.

issue will be designated for hearing. The issue to be determined is whether Commercial Realty intentionally misrepresented facts, lacked candor, or attempted to mislead the Commission about its eligibility for a bidding credit. See 47 C.F.R. § 1.17. We will additionally authorize the presiding administrative law judge to impose a forfeiture up to the statutory limit on Commercial Realty if it is determined that Commercial Realty violated the Commission's rules. Moreover, if it is determined that the Commercial Realty intentionally falsely certified on its application that it was woman-owned and controlled, because of the seriousness of such misrepresentation, we will refer the matter to the Department of Justice for possible criminal prosecution of Commercial Realty's principals.

C. Improper Communications

18. The Commission's investigation found that shortly after the close of the IVDS auctions, Mr. Hartley began soliciting other winning bidders to seek postponement of the down payment deadline. The investigation found that Mr. Hartley had at least two conversations with Christopher Pedersen, a principal of Interactive America Corporation, another successful bidder in IVDS auctions, prior to the down payment deadline. Messrs. Hartley and Pedersen discussed perceived deficiencies in the current technology and the perceived inability of winning bidders to timely construct IVDS systems.[14] Because we consider these conversations to have been made to convince other bidders that they would be at risk of substantial financial loss if they continued to pursue IVDS licenses by timely tendering down payments, we have found Commercial Realty apparently liable for a $10,000 forfeiture for each violation of our anti-collusion rules.[15]

19. It appears that Commercial Realty and Mr. Hartley violated the anti-collusion rules and substantially abused our processes in the course of making communications to other bidders before the down-payment date. On August 3, 1994, Mr. Hartley sent a facsimile letter to at least 15 of the winning IVDS bidders asking them to join him in a petition to delay the down payments. Then, on August 5, 1994, Mr. Hartley, caused a press release to be delivered to major news agencies throughout the country, calling into question the Commission's IVDS payment and build-out requirements. The press release also stated that Commercial Realty intended to default on its down payment, calling into question the substance of its own bids.

20. It appears that Mr. Hartley's sending of these letters and causing the issuance of the press releases was intended to disrupt our auction procedures, especially since it appears that Mr. Hartley knew that Commercial Realty could not make the required down payment.

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[14] Mr. Hartley testified that he wanted EON's support in joining in a request to delay the down payment deadline because he believed that EON had a lot of clout with the Commission, but was unable to broach the issue with the company's officials. Mr. Hartley also testified that he believed that there were other undisclosed bidders who did not have the money to make their down payments.

[15] Commercial Realty St. Pete, Inc., FCC 95-58 (released February 15, 1995).

The record establishes that Mr. Hartley had already decided by August 3, 1994, to have Commercial Realty default on its down payment.[16] Therefore, facing the substantial penalties associated with defaulting, it appears that Mr. Hartley engaged in potentially collusive conduct to disrupt the auction process solely for Commercial Realty's benefit. Accordingly, appropriate issues will be designated to determine whether Commercial Realty and/or its principals knowingly violated the Commission's anti-collusion rules and abused the Commission's processes by their actions in attempting to solicit other winning bidders in joining a petition to defer the down payment date. In light of the evidenced adduced under this issue, the presiding officer shall determine whether Commercial Realty and its principals should be barred from future auctions and from holding any Commission license and/or subject to a forfeiture up to the statutory limit.

IV. CONCLUSIONS AND ORDERING CLAUSES

21. It appears that Commercial Realty and its principals have engaged in serious misconduct that call into question their basic qualifications to be a Commission applicant or licensee. If such misconduct is established, Commercial Realty and its principals should be prohibited from participating in future auctions and should be deemed to wholly lack the character qualifications for holding a Commission license. We believe that each of the abuses and violations, standing alone, if proven, is sufficient to prohibit Commercial Realty and its principals from participating in future auctions and from being Commission licensees.

22. Accordingly, IT IS ORDERED, pursuant to Section 312 of the Communications Act of 1934, as amended, 47 U.S.C. § 312, that Commercial Realty St. Pete, Inc., James C. Hartley, Teresa Hartley, and Ralph E. Howe ARE ORDERED TO SHOW CAUSE why they should not be barred from future auctions and prohibited from holding any Commission license. This inquiry will focus on the following issues:

(1)(a) The facts and circumstances surrounding the aforementioned Declarations submitted to the Commission by Commercial Realty St. Pete, Inc.;

(b) Whether Commercial Realty and/or its principals misrepresented facts, lacked candor, or attempted to mislead the Commission;

(c) Whether, based on the evidence adduced pursuant to 1(a) and (b), above, Commercial Realty and/or its principals should be subject to a forfeiture up to the statutory limit pursuant to Section 503 of the Communications Act, as amended, 47 U.S.C. § 503.

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[16] In a memorandum dated August 3, 1994, to Mr. Hartley from William J. Franklin, Commercial Realty's communications counsel, Mr. Franklin noted that "you have decided not to file any deposits, and have instructed me to file a deferral petition."

(d) Whether, based on the evidence adduced pursuant to 1(a) and (b), above, Commercial Realty and/or its principals should be barred from future auctions and from holding Commission licenses.

(2)(a) The facts and circumstances surrounding Commercial Realty's claim of a bidding credit as a woman-owned small business at the IVDS auctions;

(b) Whether Commercial Realty and/or its principals misrepresented facts, lacked candor, or attempted to mislead the Commission in claiming a bidding credit as a woman-owned small business;

(c) Whether, based on the evidence adduced pursuant to 2(a) and (b), above, Commercial Realty and/or its principals should be subject to a forfeiture up to the statutory limit pursuant to Section 503 of the Communications Act, as amended, 47 U.S.C. § 503.

(d) Whether, based on the evidence adduced pursuant to 2(a) and (b), above, Commercial Realty's and/or its principals' conduct in requesting said bidding credit as a woman owned small business warrants barring Commercial Realty and/or its principals from future auctions and from holding Commission licenses;

(3) Whether Commercial Realty's and/or its principals' improper communication with Christopher Pedersen of Interactive America Corporation should bar Commercial Realty and/or its principals from future auctions and from holding Commission licenses;

(4)(a) The facts and circumstances surrounding the letter sent by facsimile to other successful IVDS auction bidders;

(b) The facts and circumstances surrounding the press release caused to be released by Commercial Realty on, or about, August 5, 1994;

(c) Whether based on the evidence adduced pursuant to 4(a), and (b), above, Commercial Realty and/or its principals abused the Commission processes and should be subject to a forfeiture up to the statutory limit pursuant to Section 503 of the Communications Act, as amended, 47 U.S.C. § 503;

(d) Whether based on the evidence adduced pursuant to 4(a), and (b), above, Commercial Realty and/or its principals abused the Commission processes and should be barred from future auctions and from holding Commission licenses;

(5) Whether, based on the totality of the evidence adduced pursuant to 1(a) and (b), 2(a) and (b), 3, and 4(a), and (b), above, and the violations of the

Commission's Rules established in the Notice of Apparent Liability for Forfeiture, File No. 519WT0002, Commercial Realty and/or its principals should be barred from future auctions and from holding Commission licenses.

23. IT IS FURTHER ORDERED THAT the hearing shall be at a time and place and before an Administrative Law Judge to be specified in a subsequent Order.

24. IT IS FURTHER ORDERED THAT Commercial Realty St. Pete, Inc., James C. Hartley, Teresa Hartley, Ralph E. Howe, and the Wireless Telecommunications Bureau are made parties to this proceeding. The parties may avail themselves of an opportunity to be heard by filing written notices of appearance under Section 1.221 of the Commission's Rules, 47 C.F.R. § 1.221, within 20 days of the mailing of this Order by the Secretary. The notice and other expedited procedures of Section 1.822(b) shall not apply in this case.

25. IT IS FURTHER ORDERED, pursuant to Section 312(c) of the Communications Act, 47 U.S.C. § 312(c), that the burden of proceeding with the introduction of evidence shall be upon the Wireless Telecommunications Bureau.

26. IT IS FURTHER ORDERED, that the Secretary shall cause a summary of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary